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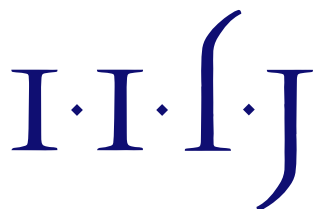
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### **THE RHETORIC OF *EUNOMIA***

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# THE RHETORIC OF *EUNOMIA*

Euan MacDonald\*

## *Abstract*

This paper presents a detailed analysis of Philip Allott's 1991 work *Eunomia: New Order for a New World*. It begins by briefly framing the work in terms of what is here referred to as "the critical challenge" to international law, and suggests that one central goal of the text is an attempted synthesis of the old opposition between philosophy and literature. It then sketches an outline of the manner in which his thesis is constructed – noting, in doing so, that despite the scope and complexity of the book, there is relatively little in the way of standard academic argument to be found therein. This leads on to the central focus of this paper: the manner in which Allott seeks to construct authority for the claims he makes and conclusions he reaches in the absence of such argumentation. To this end, the main bulk of the paper is concerned, in a manner influenced by theorists such as Chaïm Perelman and James Boyd White, with performing a critical analysis of the rhetorics of the work. It considers issues such as enacted dialectics; language; voice; metaphor; and technique; analysing each in turn for the way in which they function to bolster Allott's otherwise nakedly – if eloquently – asserted claims. It concludes that, while the early promise of *Eunomia* is undoubtedly that of confronting the irreducible contradictions and aporia identified as inevitable in the critical challenge to international law, these themes are gradually worked out and ultimately usurped – in both the rhetorics and the surface meaning of the text – by those of transcendence, unity and systemic completion; the hallmarks of Allott's mystification of society.

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\* Research Officer, Institute for International Law and Justice, New York University. I would like to thank Neil Walker, Angus MacDonald, Morag Goodwin, Camil Ungureanu, Rory Steven Brown, Keith Fleming, Martti Koskenniemi and Benedict Kingsbury for helpful comments and observations on this paper. Naturally, responsibility for any remaining errors – of fact or interpretation – remains mine alone. Thanks are also due to Andrew Clapham and in particular Daniel Warner, for kindly enabling me to make use of the facilities at the Graduate Institute of International Studies, Geneva; this paper was, in large part, researched and written during a fellowship on the PSIO there.

# THE RHETORIC OF *EUNOMIA*

*As to the style question, the esoteric style, I agree that essentially it is literature that one is trying to write. I can't see what the point of academic writing is. But literature is performative in character. The act of doing it is its content and, insofar as I have had a strategy... that would be the strategy. The influential books in the world have not been concerned with academic debates. They have been performative events invoking the imagination of the reader to join in.<sup>1</sup>*

## Introduction

International law has always, it seems, been blessed (or cursed) by a high degree of reflection by those working within the field upon its very existence and nature. As David Kennedy has outlined in some detail,<sup>2</sup> the discipline has changed and developed over time, sometimes gradually, sometimes in more dramatic ruptures, but with each change representing something of a shift in the manner in which the doctrinal fundamentals have been perceived and understood. Theorists and practitioners of international law have long been forced to accept that their discipline is inhabited – indeed, constituted – by a number of conceptual couplets, or dualisms, that often seem to exist in relations of tension, if not outright opposition, and that have done much to structure the development of doctrine; dualisms, to name but a few, such as law/politics; sovereignty/community; rules/process, etc. Much scholarly endeavour has been addressed to finding the correct way in which the competing imperatives implicit in these terms can be worked out into an internally coherent and unified system of public international law.

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<sup>1</sup> Philip Allott, comments in “Thinking Another World: ‘This Cannot Be How the World Was Meant to Be’” (Review Essay Symposium on Philip Allott’s *Eunomia* and *Health of Nations*), 16 *European Journal of International Law* (2005) 255-297, p. 271.

<sup>2</sup> See e.g. David Kennedy, “When Renewal Repeats: Thinking Against the Box”, 32 *New York University Journal of International Law and Politics* (1999-2000) 335-500.

During the 1980s, however, certain voices on the critical periphery of the discipline, heavily influenced by the Critical Legal Studies movement, began taking a different approach to these dualisms, their role in international legal discourse and the way in which they structured argumentation within the discipline. Although by no means the first work of its type in this genre, by far the most influential and comprehensive book on this topic was Koskenniemi's *From Apology to Utopia: The Structure of International Legal Argument*, first published in 1989. Along with a number of other key figures, in particular people like David Kennedy and Anthony Carty, Koskenniemi laid down a challenge to international law that has, for many, yet to receive a full and satisfactory answer, either from the mainstream or from the periphery of the discipline. The basis for this challenge, which I will here refer to (perhaps, admittedly, somewhat reductively) as *the* critical challenge to international law, lay in two separate claims regarding the dualisms about which, as noted above, scholarship had long been conscious: their *ubiquity* (under, albeit, a variety of different guises) and their *insolubility* (the fact that they were not mere dualisms, but *contradictions*).

For Koskenniemi and others, these doctrinal contradictions were mere reflections of a deeper problem at the heart of the liberal theory from which they were drawn: that there was simply no way in which, in a world of radically subjective values (a basic axiom of the “modern problematic”, as constructed by Koskenniemi at least),<sup>3</sup> law could provide an entirely neutral and objective means of arbitrating between competing visions of the good. Law, in the final instance, could not be rigorously and completely separated from politics, as the liberal ideal seemed to require. The critical challenge to international law is thus, at the most basic level, to attempt to formulate an understanding of international law that acknowledges the inevitably political nature of our legal arguments, and the ethical responsibility that this entails, without rejecting either the radical subjectivity of values *or* the impossibility of legal (or ethical) objectivity and neutrality. These arguments are by now so well known, and indeed widely accepted, as to have come to form in many ways part of the

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<sup>3</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argumentation* (Helsinki: Finnish Lawyers' Publishing Company, 1989) p. 63.

disciplinary common sense;<sup>4</sup> I do not propose to rehearse them here. What is worth noting is that, as a result of this critical work, those writing on international legal theory are, ultimately, faced with one of two choices: either reject the challenge, and reaffirm the possibility – in theory at least – of the modern ideal of objective, neutral and apolitical law; or *take it up in its own terms*, that is, accepting the ubiquity and irreducibility of the contradictions that inhabit international legal doctrine, and attempting to theorise the discipline anew on that basis.

Much scholarship since the 1980s that has not been concerned with formulating this critical challenge itself has either chosen the first of these options, or simply failed to engage with it at all. One striking exception to this can be found, however, in the work of Philip Allott, whose sprawling and complex oeuvre represents, at first glance at least, an ambitious attempt to perform precisely the second sort of response to the critical challenge to international law (which he himself had been prominent in formulating): it proceeds on the basis of the radical subjectivity, and hence necessary construction, of all ethics and law; rejects the possibility of an apolitical or objective neutral arbitration; and attempts from there to generate – at the highest level of abstraction possible – a general theory of what the future of international law, and international legal scholarship, should be.<sup>5</sup> While Koskeniemi's work in *From Apology to Utopia* was ostensibly an examination of disciplinary anxiety – *why* was international law constantly having, if not to prove, then to justify its existence? – Allott had already by this stage moved beyond this issue, and sought instead to infuse the discipline with a self-confident and robust general theory of its own functioning. The purpose of this paper, then, is to provide a detailed analysis of what is probably one of the earliest, and undoubtedly the most sustained, attempts to respond to the

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<sup>4</sup> See e.g. Gerry Simpson, "The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power", 11 *European Journal of International Law* (2000) 439-464, at p. 439.

<sup>5</sup> The question may be asked at this point, why *Eunomia* as opposed to the more recent work, *The Health of Nations: Society and Law Beyond the State* (Cambridge: Cambridge University Press, 2002)? The answer is twofold: firstly, *Eunomia* remains the most general and abstract attempt by Allott – perhaps by anybody – to respond to the critical challenge in the manner and at the level that I have sketched it here; secondly, and relatedly, it continues to provide the philosophical platform upon which much of his later work, including *The Health of Nations*, is based. See also, for example, his more recent essays on "The Concept of International Law" 10 *European Journal of International Law* (1999) 31-50 (which in many ways restates the thesis of *Eunomia* as it relates to the future conceiving of international law) and "The Emerging International Aristocracy", 35 *New York University Journal of International Law and Politics* (2002-2003) 309-338 (which concludes (at p. 337) with a call for "systematic social transcendence" very clearly based upon the general theory set out in his first book).

critical challenge in its own terms: Allott's treatise entitled *Eunomia: New Order for a New World*.<sup>6</sup>

As Koskenniemi has noted,<sup>7</sup> some of the most immediately striking features of Allott's writing are the numerous oddities of tone, style and technique of which he makes use. This being said, it is perhaps surprising that few if any attempts have been made to engage not merely with *what* Allott is saying, but the crucial (and profoundly related) questions of *how* he is saying it and *why* he has chosen that way of expressing himself. This is a book in which the reader can easily lose himself; it requires a lengthy period of sustained analysis in order to get much of any value out of it at all – and this, perhaps, is quite intentional on the part of the author. Regrettably, this, coupled with Allott's sometimes breathtaking ability to formulate propositions in new and surprising ways, has meant that there have been relatively few sustained attempts to get to grips with its content, broadly understood; all too often, where it is cited at all, it is used either as a sort of repository of ready-made (and readily-adaptable) quotations, or presented as a whole as general authority for the vaguest and most speculative of suggestions.

Thus, until recently, scholarly interrogation of Allott's work was largely limited to one or two short reviews of his published books,<sup>8</sup> which, although illuminating, can scarcely do justice to what are remarkably difficult and complex works. The situation has improved recently, however, particularly with the recent symposium on Allott's work in the *European Journal of International Law*.<sup>9</sup> Even in this context, however, surprisingly little attention is paid to the style, techniques and voice of Allott's writing; only Koskenniemi's contribution takes these considerations as central,

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<sup>6</sup> Allott, *Eunomia: New Order for a New World*, 2<sup>nd</sup> edition (Oxford: Oxford University Press, 2001).

<sup>7</sup> Martii Koskenniemi, "International Law as Therapy: Reading *The Health of Nations*", 16 *European Journal of International Law* (2005) 329-341, p. 331.

<sup>8</sup> See e.g. Anthony Carty, "Social Theory and the 'Vanishing' of International Law: A Review Article", 41 *International and Comparative Law Quarterly* (1992) 939-945; Koskenniemi, "*Eunomia: New Order for a New World*: Review", 87 *American Journal of International Law* (1993) 160-164.

<sup>9</sup> See generally Iain Scobbie, "Slouching Towards the Holy City: Some Weeds for Philip Allott", 16 *European Journal of International Law* (2005) 299-314; and, in the same volume, Karen Knop, "Eunomia is a Woman", 315-328; Thomas Franck, "The Fervent Imagination and the School of Hard Knocks", 343-346; Rosalyn Higgins, "Final Remarks", 347-353; and Martii Koskenniemi, loc. cit. n. 7. Also noteworthy is the general discussion involving several different scholars, in the same journal, at 255-297.



focusing on what he terms the “baroque aesthetic”<sup>10</sup> that characterises *Eunomia* and other works. I will have cause to return to a number of Koskenniemi’s suggestions in what follows below; for the moment, however, in order to justify my contention that rhetorical analysis is crucial to any attempt to understand this book, I will focus on just one: the centrality of *self-evidence* to Allott’s claims.

Koskenniemi draws attention, perhaps somewhat euphemistically, to “the absence of a political theory in Philip’s writing”.<sup>11</sup> What I think he is referring to here is the fact that there is very little, despite the scope and complexity of the book, in the way of *argument* in support of the claims made in *Eunomia*. Certainly, there are some relatively frequent allusions to logical – or, perhaps better, quasi-logical – progressions, but it is never necessary to retrace the justificatory steps too far back before arriving at what is essentially naked, if eloquent, assertion. In short, as Koskenniemi notes, Allott, in the final instance, relies heavily on the self-evidence of his claims for their authority;<sup>12</sup> they must stand or fall on their own persuasive ability, and, given the scope and degree of progression in the book, there is a sense in which the reader is either “in” or “out” from a very early stage. White has noted that the appeal to self-evidence is “the most powerful appeal of all, when it works”;<sup>13</sup> but, (as Perelman might have responded)<sup>14</sup> when it doesn’t, when it fails to convince its audience, it is among the weakest.

Another important, related point that might be mentioned in this regard is Allott’s own understanding, contained in the quote with which I began this paper, that his work should be read not as a standard academic text, but rather as a piece of *literature*. Of course, viewing philosophy and literature as profoundly related, rather than conceptually distinct, endeavours is not new; in doing so, Allott can be seen as continuing a tradition that stretches back (at least) as far as Nietzsche, continues

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<sup>10</sup> Koskenniemi, loc. cit. n. 7.

<sup>11</sup> Ibid., p. 337.

<sup>12</sup> Ibid., p. 330.

<sup>13</sup> James Boyd White, *Acts of Hope: Creating Authority in Literature, Law and Politics* (Chicago: University of Chicago Press, 1994), p. 292.

<sup>14</sup> See e.g. Chaim Perelman, *The Idea of Justice and the Problem of Argument* (London: Routledge, 1963), p. 109-124. He notes that “[a] proposition is ‘evident’, or, as is more often said in English, ‘self-evident’, when anybody who can grasp the meaning of its terms is certain of its truth. On this view the assent of the intellect, in contrast to that of the will, is a direct function of the entity which is grasped. It is not in the power of the intellect to control or determine the degree of this assent...” (p. 110).

through much of the French existentialist thinkers such as Sartre and De Beauvoir, and found more contemporary expression in the works of thinkers as diverse as Foucault and Rorty (to name but a very few). Indeed, the turn to literature can be seen in many ways as a recurring motif of those that share the basic philosophical commitments that underpin the critical challenge, broadly understood. It is worth pausing to reflect briefly, however, on precisely what has driven this turn, and the implications of this for the type of claims that can be made.

In 1958, the British playwright Harold Pinter wrote that “[t]here are no hard distinctions between what is real and what is unreal, nor between what is true and what is false. A thing is not necessarily either true or false; it can be both true and false”. In his speech in acceptance of the Nobel Prize for Literature in 2005, he sought to nuance this claim in the following manner:

I believe that these assertions still make sense and do still apply to the exploration of reality through art.... the real truth is that there never is any such thing as one truth to be found in dramatic art. There are many. These truths challenge each other, recoil from each other, reflect each other, ignore each other, tease each other, are blind to each other. Sometimes you feel you have the truth of a moment in your hand, then it slips through your fingers and is lost.<sup>15</sup>

Throughout those philosophical works characterised by their embrace of literary principles, the common thread seems to be this radical rejection of the necessity of a singular, unitary Truth in any given situation. Rather, theory that inhabits a literary paradigm is constantly alive and sensitive to the existence of a plurality of different, often conflicting truths, irreducible to a single, coherent proposition; what White has referred to as the “art of many-voicedness”.<sup>16</sup> Within this type of paradigm, the myriad ways in which authority can be constituted for the claims that we make is very properly, indeed of necessity primarily, the stuff of rhetorical analysis, in the expanded sense given to that term in the work of White and others; it speaks directly

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<sup>15</sup> See Harold Pinter’s Nobel Prize acceptance speech, Thursday 8th December 2005, available on the Guardian Unlimited website, <http://books.guardian.co.uk/news/articles/0,6109,1661516,00.html>.

<sup>16</sup> White, “Thinking About Our Language” 96 *Yale Law Journal* (1986-1987) 1960-1983, at p. 1966: “The art of all speech, all expression, thus lies in learning to qualify a language while we use it: in finding ways to recognize its omissions, its distortions, its false claims and pretensions, ways to acknowledge other modes of speaking that qualify or undercut it. The art of expression is the art of talking two ways at once: the art of many-voicedness”.

not only to the relation that the author creates with his immediate audience, but also, ultimately, to the vision of community that he imagines and invites us to adhere to through his writings: “What kind of community shall it be? How will it work? In what language shall it be formed? These are the great questions of rhetorical analysis. It thus always has justice and ethics – and politics, in the best sense of that term – as its ultimate subjects”.<sup>17</sup>

It is for these reasons that rhetorical analysis is crucial to the study of *Eunomia*, for it is only through this that we can get a sense of how Allott constructs the authority claims that he makes – how he proposes to induce the adherence of the reader, both to his premises and to his conclusions. Given, then, the “absence of a political theory” in the work capable of justifying the claims made (either in a “top-down” or “bottom-up” manner), we must look to the other ways in which they are made to appear authoritative, and ask what they hide and what broader arguments these invite us to commit ourselves to. It is thus my view that there is considerably more going on in the rhetoric of *Eunomia* than there is in the surface meaning of the work, to the extent that such a distinction can be upheld at all.<sup>18</sup> I must stress, however, that the critique presented here represents only my own struggle to get to grips with what is a hugely imaginative, complex and difficult work; and it is in this sense that the following pages are offered, in the hope that initiatives like the recent symposium in the *European Journal* will mark the beginning, and not the end, of a rich and detailed – and long overdue – conversation on Allott’s important contribution to the study of international society and its law.

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<sup>17</sup> James Boyd White, “Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life”, 52 *University of Chicago Law Review* (1985) 684-702, at p. 695.

<sup>18</sup> It is worth noting at this point that this paper was originally written in the context of a broader attempt to rethink international law after the critical challenge, in which the idea of rhetoric plays a central role. For my purposes here, however, it is important merely to acknowledge the extent to which my own thoughts in this regard – and the critique formulated in this paper – have been influenced by the writings of Chaïm Perelman and James Boyd White. See generally Perelman and Olbrechts-Tyteca, *Traité de l’argumentation: La nouvelle rhétorique* (Brussels: Editions de l’Université de Bruxelles, 4<sup>th</sup> ed. 1970); Perelman, *The Realm of Rhetoric* (Notre Dame: University of Notre Dame Press, trans. William Kluback 1982); White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1994); White, *Acts of Hope: Creating Authority in Literature, Law and Politics* (Chicago: University of Chicago Press, 1994); and White, *Living Speech: Resisting the Empire of Force* (Princeton: Princeton University Press, 2006).

### **The Structures of *Eunomia* – An Overview**

It is quite simply impossible to condense a work such as *Eunomia* into a few short pages; no summary could ever hope to do justice to the complexity and depth of the book.<sup>19</sup> Equally, however, it would not be appropriate to perform a rhetorical analysis without first attempting to outline some of its basic claims and trace some of the argumentative steps upon which its conclusions rely. In this short section, therefore, I will seek to provide an analysis of his central claims, particularly with regard to the general theory of society that he constructs in the first two sections of the book, and which he then looks to apply, in the third, to international society and its law, with a view to making the rhetorical analysis that follows more comprehensible, and, I hope, to providing the necessary context to make my own conclusions in respect of the book more plausible. In what follows, then, I will sketch the main themes upon which Allott imagines his theory of society and the manner in which they progress, before proceeding to an examination of the rhetorical techniques that he makes use of in order to infuse his claims with authority.<sup>20</sup>

The promise of the early, introductory chapters of *Eunomia* is unquestionably that of paradox, aporia and irreducible tension; the promise, if you will, of the literary paradigm. Allott begins by outlining, at the most general level imaginable, a basic theory of, or at least approach to, *language*, according to which words are the basic building-blocks from which we constitute our individual and social realities – in his own terms, the “reality-for-itself” of the individual and of the society. That he understands language as both contingent and constructive is immediately clear: he states, in characteristically unequivocal terms, that “to choose our words is to choose a form of life. To choose our words is to choose a world”,<sup>21</sup> and that “the permanence of a world is a powerful illusion”.<sup>22</sup> Moreover, in terms that echo closely White’s,<sup>23</sup>

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<sup>19</sup> It is often best, in these situations, to let the author speak for himself; which is why perhaps most useful summary of the main themes of the book is to be found in Allott, “Reconstituting Humanity - New International Law”, 3 *European Journal of International Law* (1992) 219-252. The “Synopsis” contained in Chapter 20 of *Eunomia* is of little or no use to those who have not actually read the book.

<sup>20</sup> In proceeding in this manner, I naturally do not intend to suggest that we can separate entirely what he says from how he says it; of course, the meaning of the former is to a very large degree constituted in the latter. Nonetheless, this does not mean that the distinction between, for example, surface and enacted meaning, although admittedly artificial to a degree, cannot be useful in performing a rhetorical analysis of a text.

<sup>21</sup> Allott, op. cit. n. 6, at §1.11.

<sup>22</sup> Ibid., at §1.18.

<sup>23</sup> See e.g. James Boyd White, *Justice as Translation*, op. cit n. 18, at pp. 3-21.

Allott argues that our vocabulary often seems inadequate to the task we set it, that of encapsulating and rendering communicable all that which we experience:<sup>24</sup> “by one and the same process, our capacity to communicate expands as the social constraints on our imagination increase.”<sup>25</sup> Language, then, for Allott, is the basic tool from which human beings construct their world of consciousness; and yet, the words that constitute it are never able to provide a perfect reflection of reality, either of the physical world or that of individual (or, indeed, social) experience. Instead, humans construct and develop their shifting meanings only in and through their usage; and this, as Allott acknowledges, necessarily introduces an irreducible element of uncertainty and tension into the very building-blocks of human consciousness.

This idea is then picked up and developed in the next (again, essentially introductory) chapter, in which Allott turns his attention to the notion of *consciousness*; this he defines as the mind’s ability to study its own functioning, its capacity of “*ordering its own activity*”.<sup>26</sup> Again, the idea of irreducible tension is very prevalent in his discussion here, focusing on the manner in which doubt functions as the basic motor of rationality:

Reason has sought, over and over again, to doubt itself. It is as if it were a necessary part of the functioning of reason that it should constantly oppose itself... It has been a dialectical process, a constant interaction, dialogue, struggle between the integrating and disintegrating tendencies of the mind... The result has been that humanity has never achieved a state of unquestionable certainty on any matter, has never fallen into any settled and total uncertainty, and has experienced an incalculable number of degrees of certainty between the two extremes.<sup>27</sup>

The conflict that this inevitably generates is not merely the cause of “a sort of anguish or pain or noise”<sup>28</sup> within the consciousness that recognises tensions between two or more ideas that it holds; it can also be a productive force, as consciousness seeks to synthesise it, and thus “generate a new idea that is more than the old ones without negating them”. Nonetheless, such synthesis is not always forthcoming, and is never

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<sup>24</sup> Allott, op. cit. n. 6, at §1.12.

<sup>25</sup> Ibid., at §3.3.

<sup>26</sup> Ibid., at §2.11.

<sup>27</sup> Ibid., at §2.9-2.10.

<sup>28</sup> Ibid., at §2.31

absolutely final in any event, as new tensions are introduced by the attempt to integrate the new idea within consciousness;<sup>29</sup> thus it is that Allott speaks of the “*endless* pattern of conflict and equilibrium”.<sup>30</sup> This is perhaps the earliest introduction into the work of the basic dialectical assumptions that drive the theory of *Eunomia*.

Perhaps the clearest example of Allott’s adherence to the basic philosophical commitments that had driven the critical challenge comes, however, in his discussion of what he calls the “perennial dilemmas of society”.<sup>31</sup> In terms similar to those that I have used here, he argues that “social life is a perpetual struggle with the obscure duality of the human condition”.<sup>32</sup> He then proceeds to break down this aporia into “a series of dilemmas in which the ambiguous duality of the human condition is lived socially”, namely the self and the other; the one and the many; unity of nature, plurality of value; justice and social justice; and new citizens, old laws.<sup>33</sup> Crucially, he goes on to note that “[t]he word *dilemma* is here used to refer to a situation in which consciousness is presented with possibilities which are seemingly in conflict, contradictory, incompatible, irreconcilable, and which cannot be finally resolved or eliminated, but which can never be evaded”.<sup>34</sup>

It is worth noting at this point a distinction of fundamental importance that Allott introduces early on in the book: that between what he posits as the three “levels” of theory practical, pure, and transcendental: “*Practical theory* is the set of ideas on the basis of which actions are willed. *Pure theory* is the set of ideas which are used to explain practical theory. *Transcendental theory* is the set of ideas which are used to explain pure theory”.<sup>35</sup> Not, however, that one of the three should be viewed as in some sense philosophically prior to the others; rather, they all exist in a relationship of mutual reinforcement. Allott is quite clear: the purpose of *Eunomia* is to provide a

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<sup>29</sup> Ibid., at §2.33-2.34. Later in the book, Allott goes so far as to acknowledge that consciousness “*must* contain conflicting ideas” (§5.8, emphasis added).

<sup>30</sup> Ibid., at §2.36 (emphasis added).

<sup>31</sup> On this, see generally *ibid.*, chapters 4-6; for a summary, see also Allott, loc. cit. n. 12, at §13.1-13.12.

<sup>32</sup> Allott, op. cit. n. 6, at §4.9.

<sup>33</sup> Ibid., at §4.10.

<sup>34</sup> Ibid., at §4.11.

<sup>35</sup> Allott, op. cit. n. 6, at §2.49.

pure theory of society,<sup>36</sup> one that is potentially universal insofar as it is “capable of being the theory acted upon by all participants in international society”.<sup>37</sup>

It is, I think, in these definitions that we can find the key to the puzzling lack of standard argumentation and justification that characterises *Eunomia*. Allott’s goal, as noted above, is to provide a pure theory of society; by his own definitions, this can be justified, or “reinforced”, only with reference to the practical theories that it makes possible (in Allott’s terminology, the “potential co-ordinate” of reason)<sup>38</sup> or through its deduction from a transcendental theory – “the set of ideas” that makes possible “a set of ideas explaining other ideas (the “genetic co-ordinate” of reason).<sup>39</sup> There is no suggestion in Allott’s taxonomy that a pure theory is capable of furnishing its own justifications; indeed, he explicitly states the contrary. Allott, however, steadfastly refuses to countenance any forays into the realm of practical theory, instead noting simply that a pure theory, such as his, can generate a wide array of different – we may even suggest conflicting – practical theories;<sup>40</sup> and neither is there any real attempt to develop anything that might be recognisable as a transcendental theory in terms of which the theory he is proposes might be justified. The author himself has recently summed up the book thus:

In *Eunomia* I postulate the idea that societies have a theory of themselves. Over time they construct an idea or image, an analytical construct – theories of what the principles of society *are*. To a very perceptive insider and perhaps to a slightly less perceptive outsider, it is possible to identify the theory of society, which then means that most things in the society become deductive... This raises the very interesting question of what the theory of international society is (or could be).<sup>41</sup>

Allott’s goal, then, is both to identify the prevailing theory of international society (which he locates in the Vattelien tradition),<sup>42</sup> and then to critique it in the light of his pure theory of society – a vision of what society, including international society,

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<sup>36</sup> See e.g. *ibid.*, at §2.51 and §12.28.

<sup>37</sup> *Ibid.*, preface, at xlviii. The congruence between this definition of universality and Perelman’s definition of philosophical thought, justified in terms of its intended appeal to a “universal audience”, is certainly noteworthy. See Perelman and Olbrechts-Tyteca, *op. cit.* n. 18, at pp. 40-46.

<sup>38</sup> *Ibid.*, at §2.26.

<sup>39</sup> *Ibid.*, at §2.54.

<sup>40</sup> *Ibid.*, at §2.53.

<sup>41</sup> Allott, *loc. cit.* n. 1, at p. 257-258.

<sup>42</sup> *Ibid.*, p. 258; see also Allott, *op. cit.* n. 6, at §13.105.

could become. The difficulty here should be evident: in the absence of either a transcendental theory to justify his pure theory, or a potential practical theory that could reinforce it, Allott must rely on an appeal to self-evidence to support his claims – not only his characterisation of the then prevailing theory of international society as essentially Vattelian, but also *for the construction of the pure theory in the light of which he critiques the status quo*. The first part of the argument has a largely empirical element, much more amenable to claims of self-evidence; the second, however – which Allott openly acknowledges as “utopian” – is much harder to justify in this manner. In effect, Allott defines his own goals and terms of reference in such a manner as to compel him to claim self-evidence for his utopian vision; and it is this that in many ways necessitates the adoption of the imaginative rhetoric that pervades the entire book.

This being said, there are, in my view, a number of suggestive passages, particularly in the early stages of the book, that hint provocatively at elements of the transcendental theory upon which Allott might seek to justify his work. As the focus of the book is on pure theory, however, these are dealt with in a manner that is at best cursory, introduced as the result of sometimes surprisingly brief and broad analyses, and themselves receiving little more than assertion by way of justification. Perhaps the best example of this is provided by his attempt to justify the type of pure theory that he is proposing: after an overview of what he views as the seven main different types or schools of philosophy (conducted in just a few short paragraphs), Allott reaches the following startling conclusion:

In summary, it may be said that the long and complex story of consciousness-considering-consciousness implies the following common ground. (1) Human reflective consciousness has recognized in itself a process of self-ordering which calls for an explanation, an explanation which must ultimately imply, if it cannot ever wholly articulate in words, a general theory of consciousness itself and probably a general theory of the nature of all reality...<sup>43</sup>

It is from this that Allott first sets out the hypothesis of the book; a hypothesis that “seeks to identify the *necessary system of reason* as a particular mode of functioning of consciousness”. He then goes on to note that “such a hypothesis would not only

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<sup>43</sup> Allott, op. cit. n. 6, at §2.23.



cover the reasoning of the mind of the individual human being but also the social aspect of reason, the communal ordering of consciousness in society”.<sup>44</sup> In doing so, he introduces two more ideas that are of central importance to his thesis as a whole (and to which I will have occasion to return later): firstly, that individual reality and social reality, individual consciousness and the “consciousness” of society, are two types of the same basic system, that function according to the same basic rules;<sup>45</sup> and secondly, that both the physical and social worlds, the reality-in-itself of the non-human sphere and the reality-for-itself created by consciousness, are made up of units that are themselves microcosms of the whole, each obeying a structure and a system that is governed by the same general rules, the same pure theory. It is this latter point that Koskenniemi refers to as the “Baroque aesthetic” in Allott’s work;<sup>46</sup> to me, in doing so, he underestimates its significance – a point to which I will return below. For the moment, it is sufficient to note that, although much if not all of the argumentative platform of *Eunomia* collapses if these three elements of a transcendental theory outlined above are not accepted, they themselves receive little if anything in the way of justification beyond their mere assertion. Once again, it is in the rhetorics of the piece that Allott constructs their authority.

It is, however, through these elements of a transcendental theory that Allott begins to undermine the notion of irreducible and irredeemable conflict – so central to the critical challenge and so evident in the opening chapters of *Eunomia* – and replace it with a vocabulary of reconciliation and transcendence, in such a manner as to begin to progress (or, depending on your viewpoint, regress) towards a much more classically philosophical standpoint. One example of this is in his assertion that society is “a totality, an integrated structure, a self-coherent system”;<sup>47</sup> another is provided by the following passage, ostensibly on religion:

Religion is as natural to a human being as thinking. To will and to act is, for a human being, to will and act through consciousness in accordance with value under the impulsion of desire and within the constraint of obligation. It is natural, therefore, that reflexive and reflective consciousness will seek to find a theory to reconcile, within a single structure of significance,

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<sup>44</sup> Ibid., §2.24.

<sup>45</sup> Allott’s most sustained assertions of the equivalence between individual and social reality are in *ibid.*, ch. 9.

<sup>46</sup> Koskenniemi, *loc. cit.* n. 7.

<sup>47</sup> Allott, *op. cit.* n. 6, at §9.30

all willing and acting, all values, all desire and obligation, all of the impulse of life and all of the necessity of the universe. Such is the function of religion.<sup>48</sup>

Here already we can see that the idea of perennial dilemmas, and the tensions and contradictions that drive them, is giving way to notions of theory very much in the old “grand style” of Philosophy. Allott here is keen to characterise as natural the search, not merely for a coherent and unified theory of the individual and social worlds of consciousness, but for a general theory that could account, “within a single structure of significance”, for both the reality-for-itself of consciousness *and* the reality-in-itself of the physical world, and presumably for the interactions between the two. That Allott’s utopian vision has a decidedly religious element to it has been remarked upon;<sup>49</sup> and we may take it that this passage is an attempt to justify – through assertion supported by rhetorical devices – his own project of determining the overarching, reconciling, synthesising principle of societal order.<sup>50</sup> The existence of such a principle – a fundamental postulate of Allott’s pure theory – is supported, in the surface meaning of the text at least, only by reference to the transcendental hints of the early chapters. The rhetoric of the above passage, and others like it, is something that I will again have cause to return to below.

As the book progresses, then, notions of conflict, tension and contradiction increasingly assume a back seat, to be replaced by those of reconciliation, integration and surpassing or transcendence. Duality is replaced by an increasing reference to ideas of unity and coherence. As noted above, society is compared to the individual – the constitution of the former being equivalent to the personality of the latter.<sup>51</sup> Allott then asserts that each society – “from the society of the particular family up to and including the society of the whole human race”<sup>52</sup> – has three constitutions: the legal, the actual and the ideal; in these, society’s struggle with the perennial dilemmas is played out, generating what he refers to as the “total social process” of that particular

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<sup>48</sup> Ibid., at §6.19.

<sup>49</sup> See e.g. Anthony Anghie’s comments in “Thinking Another World”, loc. cit. n. 1, at p. 277.

<sup>50</sup> Chapter 8 of *Eunomia* is preceded by the following quote from Boethius: “It is not surprising if ignorance of the principle of its order makes people think that an idea is unplanned and chaotic.”

<sup>51</sup> Ibid., at §9.2.

<sup>52</sup> This is a favourite and recurring phrase in the work, indicating the transcendental element of the microcosm that I refer to above; see e.g. *ibid.*, at §11.16

society.<sup>53</sup> The legal, actual and ideal constitutions are defined, respectively, as “a constitution that presents its [society’s] past as an actuality, a constitution which is contained in its willing and acting, and a constitution which contains the possibilities of its future”.<sup>54</sup> He then introduces the central concept of the “social exchange”, the means by which natural power is “exchanged” by individuals for social power (that is, power exercised for the purposes of society),<sup>55</sup> most often in the form of legal relations, viewed as mechanisms for “integrating” (read synthesising) “the willing and acting of members of society... with the willing and acting of society”:<sup>56</sup>

Social power comes from the nature and functioning of the society as a structure-system, capable of making transformations which turn its possibilities into actualities, which transform its future into its past, which achieve its purposes. Social power is energy transformed for the purposes which flow from the systemic structure of society. To achieve its purpose, society transforms natural power into social power and transforms social power into natural power. This is the *social exchange*.<sup>57</sup>

Allott thus presents the social exchange, of natural power for social power in the form of legal relations, as the synthesis of individual and social purposes, in terms that strongly recall those of the Hegelian dialectic: “By the social exchange in the form of legal relations, society is able to universalize the willing of its individual members and to particularize its own willing within the willing of its members”.<sup>58</sup> Again, however, it is important to note that none of the profoundly complex and difficult argument that went into Hegel’s elaboration of his dialectical method is present in Allott’s work; instead, we are presented with dialectical resolution as a *fait accompli*, based upon nothing more than the assertion of the functioning of the “social exchange”, itself a product of the “total social process” of society.

Allott later uses this framework as a means of interpreting the various stages in the development of society, from the notion of unlimited sovereignty towards that of

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<sup>53</sup> Ibid., at §12.65.

<sup>54</sup> Ibid., at §9.6. See also Allott, loc. cit. n. 12, at §11.1-11.3.

<sup>55</sup> Allott, op. cit. n. 6, at §10.22; see also §17.29.

<sup>56</sup> Ibid., at §10.32.

<sup>57</sup> Ibid., at §10.19.

<sup>58</sup> Ibid., at §20.14; see also §10.59. For the importance of the synthesis of universal and particular interests to the Hegelian dialectic, see e.g. G.W.F. Hegel, *The Philosophy of Right* (Chicago: Encyclopaedia Britannica, 1952), at p.280 (additions).

democracy. He asserts first that “democracy is the dialectical successor of sovereignty”,<sup>59</sup> and then proceeds to justify this statement by outlining the progression, through the occurrence of “social exchange... at the level of theory”, first to the notion of “constitutional sovereignty”, and then, by dialectical progression founded on the “unpromising paradox” of limited sovereignty, arriving at the ideal of democracy, “by finding a basis of all social power not merely in the idea and the fact of authority but in the *constitution* of society”:

In a fateful act of mutual self-creating, the people and the government made each other, the one as the embodiment of society, the other as the embodiment of the state. The citizens surrendered to government, as government surrendered to the citizens. Each, in doing so, empowered the other. Thus did state-society surpass itself as state-society.<sup>60</sup>

Here we can clearly see how the framework that he has constructed in terms of the dialectical power of the social exchange allows him to develop an interpretation of history in which democracy, as “a universalizing of particular wills in the willing of society” that “naturally seeks the universal purpose of all wills in society, naturally seeks to universalize all particular desire”,<sup>61</sup> came to “solve” the classic *pouvoir constituant/ pouvoir constitué* dichotomy as the ideally-suited dialectical counterpart to the pursuit of justice through the legal relations generated by the social exchange. Allott’s point, of course, is not that this actually happened, but rather that, at the level of ideal theory, democracy came to conceive of itself in this way, and thus to create the possibility of this future for society within its ideal constitution. He never suggests that such an ideal functioning is a practically attainable goal. This point, however, is not of particular importance; although it does mean that Allott’s theory on this (or, indeed, any other) point cannot be debunked by a crude empirical assault (“it doesn’t work that way!”), it cannot hide the fact that his attempt to construct a pure, ideal theory of society rests upon a set of assertions of the theoretical possibility of perfect dialectical synthesis, the only justification for which offered to his audience is, ultimately, their self-evidence.

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<sup>59</sup> Allott, op. cit. n. 6, at §13.2.

<sup>60</sup> Ibid., at §13.21.

<sup>61</sup> Ibid., at §13.31.

Allott's next crucial step – in some senses the centrepiece of the entire theory – is to introduce the central tenets of his pure theory of society. These he refers to as “the generic principles of the constitution”, which are “shared by all the constitutions of all societies”.<sup>62</sup> It is certainly worth recalling at this point Allott's expansive understanding of the notion of society: essentially, anything and everything that involves two or more humans in a more-or-less structured setting, from individual families, through sports teams, businesses, right up to international organisations, states, and the international society of the whole human race.<sup>63</sup> These, then, “are the principles which integrate the social process of society into a total social process, a total structure and a total system, a whole”,<sup>64</sup> and they are a set of hypotheses

intended to perform a similar explanatory function to that of general hypothetical principles in the natural sciences – the principles of Newtonian mechanics, thermodynamics, relativity, quantum mechanics, genetics. They are offered as the ultimate equations relating to constituted power in society, the constitution of constitutions as it were.<sup>65</sup>

He then suggests the following seven basic principles: law is part of the total social process (the principle of integration); law is dynamic (the principle of transformation); all legal power is delegated power (principle of delegation); all legal power is limited (principle of the intrinsic limitation of power); all social power is under the law (principle of the supremacy of law); all legal power is in the social interest (principle of the supremacy of the social interest); and all social power is accountable (principle of social responsibility).<sup>66</sup>

Of prime importance here is the issue of how he attempts to provide authority for the proposition that these seven hypothetical principles constitute the meta-ordering framework for all societies everywhere. In this regard, he makes three distinct claims: firstly, that they are analytically necessary to the coherence of his proposed theory;<sup>67</sup> secondly, that they are intended to make sense of human social experience, and as such must be judged in the “potential co-ordinate” of reason, not inductively from

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<sup>62</sup> Ibid., at §11.3.

<sup>63</sup> See e.g. *ibid.*, at §3.37.

<sup>64</sup> Ibid., at §11.4.

<sup>65</sup> Ibid., at §11.8.

<sup>66</sup> Ibid., at §11.5; see also Allott, *loc. cit.* n. 12, at §14.1-14.3.

<sup>67</sup> Allott, *op. cit.* n. 6, at §11.6.

facts or deductively from philosophy;<sup>68</sup> and thirdly, and perhaps most surprisingly, that they are in some important sense analogous or equivalent to the hypotheses of natural science whose function they are intended to perform.<sup>69</sup> The first two display, to my mind, a significant element of circularity: their analytical necessity to the theory of *Eunomia* cannot justify their assertion, unless the broader claims to self-evidence that have already been made are accepted; and, if they are to be judged in the potential co-ordinate of reason (in terms of their relation to our other ideas of society and its possibilities), then we are in effect being asked to validate them on the basis of their capacity to bring about Allott's utopian vision – which again relies ultimately on its own self-evidence.<sup>70</sup>

The third claim relies on two separate points relating to the hypotheses of natural science: firstly, that they are sufficiently coherent with other ideas that we have about the physical world to allow us to postulate that there is a reality that can enable such principles to be generated within consciousness; and secondly that the substantive content of these principles is such that it allows humans to will and act in the physical world as if they understood its principles, despite the epistemological limits on human knowledge. Scientific principles can be valid in these two senses, even if they are “incapable of transcending themselves to explain themselves”. The first claim, then, is one of general coherence within an overall structure of ideas that is generally effective; the second concerns the related issue of our ability to rely on the application of the principles to create more-or-less predictable results. Remarkably, Allott then suggests that the same thing is true of his generic principles of all constitutions: in terms, for example, of the second, essentially empirical claim, he argues that his principles “...enable human consciousness to act in society as if it understood the nature and functioning of law as a self-ordering system of society, to act as if consciousness were the master of the structure-system which it has created for itself”.<sup>71</sup> The rhetorical construction of functional equivalencies between the social and physical worlds is something that I shall return to in considerably more detail

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<sup>68</sup> Ibid., at §11.7.

<sup>69</sup> Ibid., at §11.9-11.10.

<sup>70</sup> In relation to this point, it is important to recall that we are not being asked to judge these generic principles as elements of a *practical* theory (that is, as desirable goals that society may choose to value) but rather of a *pure* theory (that is, as expressive of the nature and the functioning of all societies, regardless of whether they choose them or not).

<sup>71</sup> Allott, op. cit. n. 6, at §11.10.

below; suffice it here to say that the force of *this* justification can be empirically falsified. If the hypotheses of science stand or fall on whether they predict accurately or disappoint the manner in which the physical world actually functions, then any attempt to shift that kind justification through analogous reason onto the hypothetical principles governing all constitutions must also be subject to a similar kind of empirical verification. In doing so, Allott must descend from the abstract and ideal arguments that characterise most of the rest of the book, and submit his principles to the actual, and not the potential, co-ordinate of reason, where they would surely often be found wanting in even the most advanced and civilised of societies. To put the matter somewhat glibly, one can't help but wonder if the laws of Newtonian mechanics would have enjoyed the widespread adherence that they have, had they proved so frequently disappointing whenever attempts to will and act had been based upon them.

The generic principles of all constitutions, then, provide yet another example of a crucial step – this time perhaps *the* crucial step – in Allott's theory that relies upon the self-evidence of its rightness (backed up with some rhetorical flair) for any authority that it enjoys in the mind of the reader. Taken together, the constructions that I have outlined in this section (and in particular the social exchange, the generic principles of the constitution, and the general dialectical method) constitute the foundations for the analysis and critique of, and prescriptions for, international society and its law that Allott provides us with in the third section of the book. None of them receive much in the way of justification for their inclusion in the theory; nevertheless, he proceeds to use them as the theoretical basis for passionate and often startling assertions of his global utopian vision. As presented here, they do not appear particularly convincing; however, the analysis that I have performed until this point cannot hope to convey the sense of the book and the force of its claims, quite simply because they are not constructed through a process of argumentation in the familiar style of ordinary academic writing. Rather, as in all important works of literature, they are developed, *enacted*, in the prose itself; thus, it is through the use of a wide and varied range of rhetorical techniques, and not merely the quasi-logical progressions of standard argumentation, that Allott seeks to lead us to the recognition that what he is proposing is both right and evident (at least to the extent that we should choose to adopt it as our

pure theory of society);<sup>72</sup> so that, as one reviewer put it, it seems to us that he “continually articulates in the most startling and original ways what many of us recognize as obvious when we see it stated thus”.<sup>73</sup> Any interrogation of his work, then, that contents itself with an examination of the surface meaning of his text misses, as I hope the preceding section has suggested and the following one will confirm, what is in some senses the most important part of the theory: the ways in which it seeks to constitute authority for the claims it makes, by means other than those of standard, propositional academic argumentation. It is only then that we will be in a position to formulate a judgment on the conclusions of the book, and, more importantly, to consider the extent to which it can be viewed as a response, persuasive or otherwise, to the critical challenge to international law.

### **The Rhetoric of *Eunomia***

How, then, does Allott seek to gain the adherence of his audience to the principles and methods of his theory, most notably its dialectical method, its understanding of the “social exchange”, and its postulation of the “generic principles of society”, given the lack of explicit justification of any of these elements in the text itself? The answer, as I have already suggested, lies in the oddities of style, tone and technique that characterise this and much of his other work.<sup>74</sup> These should not, then, be regarded as simply eccentricity or linguistic flair, having little or no important bearing on the content and the persuasiveness of the book; rather, they all individually play an important role – and together, an essentially constitutive one – in terms of the persuasive, hence rhetorical, force of the piece. They should thus, when considering their effect upon the reader, be considered as a whole; however, for the sake of clarity, I propose here to break them down into the following categories: enacted dialectics;<sup>75</sup>

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<sup>72</sup> See e.g. §19.25.

<sup>73</sup> See the comment from the reviewer from the *American Political Science Review*, quoted on the back cover of *Eunomia*.

<sup>74</sup> As Koskenniemi notes, for example, in the context of *The Health of Nations*, “A few lines of this text, and every international lawyer will know who has written them”. Not all of Allott’s work is like this, however; for example, his earlier article, “Language, Method and the Nature of International Law”, in Koskenniemi, ed., *International Law* (Aldershot: Dartmouth, 1992) 63-120, and his more recent piece on “The emerging International Aristocracy, loc. cit. n. 3, are both much less esoteric in style and content.

<sup>75</sup> It should be noted that here I am referring to dialectics in the sense that the method appears in Allott’s work, that is, as a basic version of its Hegelian variation. In using the term “enacted dialectics” at this point, I do not have White’s interpretation of the enactment of the Platonic dialectical method in the Socratic dialogues, in which Plato deliberately puts specious “proofs” into Socrates’ mouth during



language; voice; metaphor; and technique. I will then examine how these function as justifications for some strong conclusions, ultimately based upon what I will term Allott's *mystification* of international society, before concluding by reconsidering Allott's general project in the light of the basic elements driving the critical challenge to international law.

### *Enacted dialectics*

As already noted, Allott's theory is based, to a large degree, on the postulation of a particular dialectic method; expressed most clearly, perhaps, in his insistence that, as a result of the social exchange, "law is the socialization of particular desire, the particularization of social desire".<sup>76</sup> There is, however, none of the complex and involved justification of this method that we find, for example, in the work of its major modern proponent, Hegel; rather, Allott simply asserts that society and its law can and do function in this manner. It is not, however, a naked assertion; rather, in an example of what Kenneth Burke has referred to as a *qualitative progression*,<sup>77</sup> the reader is prepared for, and thus more ready to accept, its introduction when it comes through the use certain other non-explicit examples of dialectic (broadly understood) that are largely implicit in the construction of the book itself. In this way, Allott introduces a *sense* or a *spirit* of dialectical progression into his work that makes its explicit assertion, when it comes, less surprising and more readily accepted. There are a number examples of this in his work; here, I want to mention just two of the most obvious.

The first, that cannot fail to strike the reader in his very first encounter with the book, can be termed the enacted dialectic of *novelty and pedigree*. Everything about the book seems new and different: the programme, the language, the style, and even the author's approach to the conventions of punctuation – many of which I will have

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dialogues in order to "teach" the reader, who is led by his frustration with Socrates' presentation of the argument to engage in a sort of dialectical reason himself with the text. See White, "The Ethics of Argument: Plato's *Gorgias* and the Modern Lawyer", 50 *University of Chicago Law Review* (1983) 849-895, at pp. 863-866.

<sup>76</sup> Allott, op. cit. n. 6, at §14.5.

<sup>77</sup> Kenneth Burke, *Counter-Statement* (Berkeley: University of California Press, 1931) at p. 31: "Form is the creation of an appetite in the mind of the auditor, and the adequate satisfying of that appetite". He then goes on to define qualitative progression, one of the five aspects of form that he identifies, in the following manner (at p. 125): "...such progressions are qualitative rather than syllogistic as they lack the pronounced anticipatory nature of the syllogistic progression. We are prepared less to demand a certain qualitative progression than to recognize its rightness after the event".

cause to examine in more detail below. At the same time, he insists that he is engaged in a rehabilitation of a kind of philosophical thought that had lost credibility in the twentieth century: the project of elaborating a “universal”,<sup>78</sup> “general theory of society and law”.<sup>79</sup> Perhaps the most obvious instance can be found in the title of the book itself: *Eunomia* – which, we are told, is the ancient Greek term for the principles of the well-ordered society – immediately followed by its subtitle: *New Order for a New World*. The tension here is quite obvious (and, I’m sure, quite intentional): we have the employment of ancient terminology to describe, and prescribe, an entirely novel situation; and this is a theme that recurs throughout the book, although it is bound to be particularly pronounced, for the reader, in its early stages. Time and again Allott emphasises the novelty of his work; often not explicitly, but through the bewildering array of new terms that he introduces and his simultaneous problematisation of old ones, through his innovative reformulations of familiar problems, and through his refusal to provide any references to those authors upon whose work he openly acknowledges his own theory draws.<sup>80</sup> On the other hand, however, awareness of the pedigree of his project is rarely far from the surface: this can be seen, for example, in both the antiquity and the variety of the quotations with which he begins each section of his work, and is perhaps even more pronounced in his stylistic decision to systematically number his paragraphs. This latter technique is perhaps one of the most visible ways in which Allott seeks to reinscribe his project within the “great tradition”, not only of philosophy but also of religion.<sup>81</sup>

Thus Allott, from the very outset, enacts in the mind of the reader the impression that his theory is a product of the dialectical interplay between the old and the new, a synthesis of the goals of the great tradition of philosophy and the unfamiliar exigencies of contemporary international society. The effect of this on the authority of his claims in *Eunomia* is manifold: not only, for example, are we rhetorically prepared for – and thus less likely to object to – the introduction, when it comes, of a

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<sup>78</sup> Allott, op. cit. n. 6, preface, at li.

<sup>79</sup> Ibid., at xlviii. Allott is much more forthcoming on this point in the new preface to the 2001 edition of *Eunomia* (see e.g. p. xxix), and even more so in his comments in “Thinking Another World”, loc. cit. n. 1, at p. 259, where he refers to current philosophy as “orphaned” by the “20<sup>th</sup>-century madness of self-doubting, self-examination, self-deconstruction...”, calling for a return to the “great tradition” of philosophy (at p. 256).

<sup>80</sup> See *Eunomia*, op. cit. n. 6, preface to 2001 edition, at xxx.

<sup>81</sup> See e.g. Anthony Anghie’s comments in “Thinking Another World”, loc. cit. n. 1, at p. 277.

basic dialectical method as the motor of the pure theory of society that he proposes, but he is also able to claim a sort of diffuse authority for that method (it is, after all, recognisably Hegelian) without having to confront any of the criticisms that subsequent scholars have levelled at it. This latter point is true in general of the philosophical theories upon which Allott draws but which he does not explicitly acknowledge; the fact that they are familiar to us makes their assertion less jarring, whereas the fact that they are neither rigorously formulated nor particularly developed, nor provided with a citation to works in which they do receive a more elaborate treatment, makes the task of criticism seem both more difficult and less urgent. We may note that this is particularly the case in the context of what Koskenniemi has called the “Baroque aesthetic”<sup>82</sup> of Allott’s work, but which Allott has openly acknowledged as the product of a philosophical influence: the idea, central to his theory, that the structure and functioning of each element of the universe mirrors that of the whole.<sup>83</sup>

The now-curious technique of numbering paragraphs links in with the novel tone of Allott’s writings, to provide us with an example that is not merely that of novelty and pedigree, but in fact points to a second, more profound instance of enacted dialectic in *Eunomia*, one that, for me, goes to the very heart of the fundamental project of the book: that of *philosophy and literature*. As Koskenniemi has suggested, the numbering of paragraphs suggests as certain systematicity; the idea that “each idea is precisely where it should be”,<sup>84</sup> very reminiscent, for example, of thinkers in the great philosophical tradition such as Hegel. Having made this connection, the reader is immediately surprised by the juxtaposition of the content and tone of these paragraphs: the disinterested, objective mood that the mode of presentation lead us to expect is conspicuous only in its absence; and, in its place, is the excited and passionate voice of the polemicist. It is, as Koskenniemi notes,<sup>85</sup> the voice of Zarathustra (or, at least, someone who sounds like him);<sup>86</sup> this time, however, he is speaking in numbered paragraphs!

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<sup>82</sup> Koskenniemi, loc. cit. n. 7.

<sup>83</sup> Allott, op. cit. n. 6.

<sup>84</sup> Koskenniemi, loc. cit. n. 7, at p. 333.

<sup>85</sup> Ibid., at p. 331.

<sup>86</sup> See *infra* n. 160.

This almost comical juxtaposition illustrates nicely what is, to my mind, the central enacted dialectic of *Eunomia*: we are constantly confronted with the tension between the overtly rhetorical style and the explicitly philosophical goals of the book. It is clearly present, for example, in his choice of quotations with which each section begins, and the work in general ends; they are drawn not only from an impressive range of time and culture, but also – and again, I’m sure, quite deliberately – from both overtly philosophical and purely literary works. More visible, perhaps, is the presence of this enacted dialectic within the basic terms of the theory itself, as can be seen from the foundational, and equally important, roles accorded to the notions of *imagination* and *reason*; the former creates the world-for-itself of consciousness, while the latter orders it.<sup>87</sup> The implication of this is clear: whilst the “great tradition” would view only reason as properly philosophical, relegating imagination to the non-scientific, artistic realm of literature, in *Eunomia* both are given a central role in the creation of a pure theory of society’s self-constituting. In these and myriad other ways, Allott suggests – again, never quite explicitly – that the opposition between literature and philosophy (at least, philosophy in the tradition that he favours) can be transcended.

As the quote from Allott with which I began this paper suggests, then, he has abandoned the dry, formal style of standard academic writing in favour of a fluid, literary prose; a decision that has significant implications for the manner in which both meaning and authority are generated, and which – more than anything else – justifies, indeed compels, an analysis of the “performative character” of the work. The attempt to synthesise literature and philosophy, to create a theory that is more than both but that negates neither, can be viewed as the overarching framework within which the theory of *Eunomia* is presented. As I shall argue below, the enactment of this dialectic in the text has an important effect on the way in which argument is both constructed and rendered persuasive; however, the dynamic nature of dialectic also means that the greater the level of acceptance of argument, the more plausible and successful the attempt to synthesise literature and philosophy itself appears; perhaps even more so than usual, as neither the attempted synthesis nor the techniques of justification that it engenders are ever explicitly acknowledged. Both elements are

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<sup>87</sup> See e.g. Allott, op. cit. n. 6, at §5.8.

engaged in a process of mutual reinforcement, all the stronger for remaining unspoken; however, if, in being rendered explicit, one is found to be unpersuasive, the other will of necessity fall with it. It is with this in mind that I turn to some of the more concrete rhetorical justificatory techniques of Allott's work.

### *Language*

One major aspect of the undoubted novelty of *Eunomia* is Allott's general use of language, both in terms of the style he employs and the tone he adopts; indeed, the two are often intimately linked. One of the first tasks of any reader is to immediately acclimatise himself, not merely with an extensive new vocabulary, but also with significant reworkings of many more familiar terms. Moreover, there are distinct oddities of style that often render what is already a challenging reading experience considerably more so, such as the frequent use of the conjunction "and" in lists of terms where the normal conventions of writing would require commas, and, indeed, where other punctuation may normally be expected: "The hypothesis of the perennial dilemmas of society is intended to discover in the apparently amorphous dialectic of social life a regular and symmetrical and systematic pattern shaping the whole course of accumulated human social experience".<sup>88</sup> The effect of this is quite particular: it affords the reader no respite where he could normally expect some, particularly in the midst of such complex sentences, whilst giving the impression that there is a lot that must be said, and only limited time and space in which to say it – the reader must either be swept up or risk being left behind. In general it serves to create both a sense of movement and of urgency that infuses the text and allows for no pause for thought as the prose flows and unsettles and flusters and finally threatens to overwhelm; blink, and you might miss it.

More important, however, is the relentless creation of new, and problematisation of old, vocabulary throughout the course of the work. The reader must not only get to grips with a wide array of entirely novel terms and expressions – such as, amongst many others, "social exchange",<sup>89</sup> "supersocialisation"<sup>90</sup> and "unsociety"<sup>91</sup> – but also cope with the fact that the meaning of many more familiar words – such as

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<sup>88</sup> Allott, op. cit. n. 6, at §4.12.

<sup>89</sup> See e.g. *ibid.*, at §10.1.

<sup>90</sup> See e.g. *ibid.*, at §12.30.

<sup>91</sup> See e.g. *ibid.*, at §13.105.

“constitution”, “society” and even “law” – is reconstituted and reformulated within the context of the theory, sometimes more than once.<sup>92</sup> This, like the technique referred to above, serves to unsettle the reader: inundated with entirely unfamiliar terms, and unfamiliar meanings of familiar terms, compounded by the sense of movement and urgency of the prose and the complete absence of any reference to which one can anchor oneself, it is easy to feel entirely cast adrift at any number of points in the book. This almost inevitable loss of bearing can wear down even the most conscientious of readers, rendering difficult sustained critique of the claims of the theory, thus granting them a sort of authority-by-default.

Nor is it simply in terms of individual words and expressions that Allott’s use of language can prove difficult: the manner in which these are formulated into prose is itself both novel and extremely complex. As Koskenniemi notes,

...when the reader has finally relinquished all defence, he or she may perhaps be able to feel at home with such things as ‘the reality of reality’ and the ‘transcendental philosophy of philosophy, the human mind transcending all previous transcending of itself in consciousness’...<sup>93</sup>

Allott’s discussion in *Eunomia* of the conceiving of society in the philosophy of the beginning of the modern era provides a stark example of this. In terms that are really quite clear, and invoke the well-known dilemma of constituted and constituting power, he notes that early modern theorising on society

...tended to express itself in terms of the problem of the genesis of society and hence of the origin of authoritative willing in society, or, put in other words, the problem of the origin, and hence the authority, of law in society. The problem of understanding the becoming of a society would be posed as if it were a problem of how a society comes into being... To explain

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<sup>92</sup> There are, for example, many different definitions of the term “law”, and it is far from obvious that they all essentially mean exactly the same thing, or, indeed, that they are all entirely commensurable: “law is the continuing structure-system of human socialising” (§ 1.1); “law is idea not fact” (§ 6.70); “law is a set of retained acts of will” (§6.77); “law is not a set of rules. Law is will...Law is a set of legal relations” (6.79); “law is the directed self-becoming of society” (§16.4); and lastly, we may also add the definition of law implicit in his assertion that “the human animal, like the chimpanzee and the termite, is a social animal. To be a social animal is to be law-abiding” (§14.2)

<sup>93</sup> Koskenniemi, loc. cit. n. 7, at p. 332 (footnotes omitted). The passages from Allott’s work to which Koskenniemi refers here are taken from *The Health of Nations* (at p. 74 and 99 respectively), but they are sufficiently similar in style and content for the point to be valid in the context of *Eunomia*.

the willing of society expressed in law, it was necessary only to explain the willing of that willing.<sup>94</sup>

Allott's next step, however, is to rephrase this passage "in the terms of the present study", in that "the willing of law under the real constitution was willing by a will which had itself been willed under the legal and ideal constitutions. There remained the question of how society's will is itself willed".<sup>95</sup> The effect of this translation of the first passage into the style and tone of the book in general is not, in my view, to increase the clarity of the point being made; nor, I suspect, was the second formulation chosen for its aesthetic qualities. Rather, it serves to reinscribe the reader into the complex totality of the rhetoric of the work as a whole, again serving to challenge and unsettle after a brief and rare period of respite in a more familiar linguistic setting.

And this is not the only manner in which Allott seeks to provide authority for his claims through the problematisation of language. As noted above, some terms Allott invents; others, he redefines. Also illuminating, however, is his treatment of (at least some of) those terms that he seeks to discard. This is best brought out in his use of the epithet "so-called" at various points throughout the book. Thus, for example, he talks of "so-called international relations",<sup>96</sup> "so-called government",<sup>97</sup> "so-called wars",<sup>98</sup> "so-called criminals",<sup>99</sup> and even the "so-called law of contract".<sup>100</sup> In this manner, Allott not only emphasises the novelty – sometimes the radical novelty – of his own thesis, but also conveys the idea of an *unmasking*, of a progression somehow from deception to truth, of liberation from some façade of false consciousness. On occasion, we are provided with some developed argumentation supporting his reasons for doing so (such as those that he makes in support of his claim that the word "war" will disappear as a category from international law);<sup>101</sup> more often than not, however, the epithet is simply introduced without explanation, leaving its suggestive force

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<sup>94</sup> Allott, op. cit. n. 6, at §12.52.

<sup>95</sup> Ibid., at §12.53.

<sup>96</sup> Ibid., at §15.39.

<sup>97</sup> Ibid., at §16.76.

<sup>98</sup> Ibid., at §6.21

<sup>99</sup> Ibid., at §16.96.

<sup>100</sup> Ibid., at §17.26. Other uses of this epithet can be found at §1.15 ("so-called *feelings*"), §17.82 ("so-called ideological conflict") and §10.32 ("so-called *rights* and *duties*"), to name but three.

<sup>101</sup> Ibid., at §15.16. On this point, see the section below on the mystification of society in Allott's work.

entirely to the imagination of the reader. Allott's use of language in general, then, combines to create an overwhelming sense of complexity, of confusion, and of its own inherent superiority in relation to that which it opposes itself; and these considerations are all, naturally, intimately linked with those relating to authorial voice.

### *Voice*

Central to any examination of the performative force of a work is consideration of the authorial voice in which it is expressed, as this can often furnish us with the clearest idea of the kind of relation, and more broadly the kind of community, that the rhetor is seeking to establish with his audience.<sup>102</sup> The considerations of the previous two sections, on enacted dialectics and on language, are of immediate relevance in this context: Allott writes with the passion of the innovator, and the certainty of one who is standing on the shoulders of giants; his work displays both the skill of the artist and the seriousness of the philosopher, as he continually undermines the commonplaces, the *topoi*, of standard international legal argumentation with his generation of new vocabulary and his attacks on the old.

Koskenniemi has also noted, in this regard, Allott's frequent use techniques of *grandeur* in the construction of the voice of the work, such as, for example, an almost biblical style of expression – particularly where seeking to draw a conclusion – through the use of phrases such as “And so it is that”; “a technique that bridges the gap between argument and conclusion by drawing upon an obscure association to something vaguely religious or deeply philosophical”.<sup>103</sup> This in turn conveys the impression that perennial truths are being conveyed, unmasked by Allott's dialectical lifting of the veil of false consciousness in which international society, or “international unsociety”, is currently cloaked.<sup>104</sup> It is in this tone, more than any other, that Allott enacts the claim to transcendence that provides the ultimate foundation of his thesis, “the transcendental that we recognize in the aesthetic appearance of his writing but that finds no real articulation in his argument”.<sup>105</sup> And, as Carty argues, the “confident tone of the oracle” that runs throughout the book

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<sup>102</sup> On this point, see e.g. White, op. cit. n. 23, ch. 1.

<sup>103</sup> Koskenniemi, loc. cit. n. 7, p. 332.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid., at p. 339.



leaves the reader with the impression that, in matters in which he disagrees, then “‘the fault’ must lie with him”.<sup>106</sup>

This is an impression that is further engendered by Allott’s frequent habit of characterising disagreement on certain key issues as unthinkable; inhuman, even. Consider, for example, his passage on religion (broadly understood as the search for the transcendental) quoted above. He begins by noting that religion “is as natural to human beings as thinking”, and goes on to state that it is “natural, therefore, that reflexive and reflective consciousnesses” will seek the transcendental.<sup>107</sup> The intention is clear: not only are those who disagree on this fundamental (and essentially unargued) assertion engaging in a pointless disagreement with the *way things are* (the appeal to nature), they are also – what is worse – simply not thinking hard enough about it. The same device is used in his expulsion of the possibility of war from his ideal theory: “It is hard to imagine that any thoughtful human being could regard war as natural”,<sup>108</sup> ignoring the fact that many in his “great tradition” of philosophy, including, for example, Hegel, did precisely this.<sup>109</sup> These acts of excommunication, and others like them, are, as always, presented as simple, uncontroversial, self-evident truths to which all rational, moral humans will naturally consent; indeed, one of the most surprising features of the book in general, as a work of speculative utopian philosophy, is the almost complete absence of the conditional mood.<sup>110</sup>

The reader, then, is dazzled, unsettled and intimidated by the scope of Allott’s theory, the bewildering complexity and novelty of its formulations, and the severe authoritarianism of its tone. And it is in this that we might first begin to question the success of Allott’s attempted synthesis between the many-voicedness of literature and the search for philosophical truth, for it is not the irreducible conflict of the perennial dilemmas but rather the transcendental voice of History, Reason and Nature that is

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<sup>106</sup> Carty, loc. cit. n. 5, p. 939.

<sup>107</sup> Allott, op. cit. n. 6, at §6.19; see also *supra* n. 42.

<sup>108</sup> Ibid., at §15.10.

<sup>109</sup> Hegel, *The Philosophy of Right*, op. cit. n. 52, at p. 210: “the ethical health of peoples is preserved in their indifference to the stabilization of finite institutions; just as the blowing of winds preserves the sea from the foulness which would be the result of a prolonged calm, so also corruption in nations would be the product of prolonged, let alone ‘perpetual’, peace”.

<sup>110</sup> There are one or two points in the book at which the conditional mood is used; see e.g. Allott, op. cit. n. 6, at §15.82, when he discusses the “disappearing” of the theoretical notion of authority. Such moments, however, are rare indeed; and, in their scarcity, serve only to underline the certainty with which the rest of his pronouncements are intoned.

enacted, and ultimately prevails, in the rhetoric of the book.<sup>111</sup> And while, in the early stages of the work, this means that there is a certain discord between the surface meaning of the text and the enacted meaning of the language and style, it is, as I shall argue below, gradually worked out as the vocabulary of conflict is steadily usurped, and ultimately completely replaced, by that of integration, reconciliation, and systemic completion. The performative effect of the voice of *Eunomia* is thus not to encourage the reader to “join in” in the imaginative creation of a new vision of global society; rather, it requires only that he submit to Allott’s vision or risk expulsion from the community of rational, thoughtful humanity. It risks appearing as a voice intended not to elicit the active participation of the reader, but rather to dominate him. In this way, to the critical reader at least, the “utopian” element of the book begins to function as more of a threat than a promise.

### *Metaphor*

One of the central ways in which Allott supports this voice, and through this seeks to create authority for his move from the essentially conflictual understanding of the constituting of society towards one of dialectical progression and transcendental resolution, is through the construction of certain metaphors, establishing equivalencies that then assume central roles as *topoi* from which the argumentative progression of the theory is based. Broadly speaking, there are two main sets of these: the *mechanistic* and the *organic*. To my mind, although often expressed in the same paragraph (and even sometimes in the same sentence), and often bolstered by cross-application to each other, they serve two quite distinct, albeit related, purposes: the function of the former is to create and justify the expectation of society as a neatly functioning, self-contained and internally-coherent totality (at least in its ideal construction); whereas that of the latter is to provide authority for the technique, crucial to the argumentative platform of the entire work, of the personification of society, and to render the claims to natural progression, to an evolution of society, less jarring and thus more acceptable. It is also worth noting at the outset, however, that both are powerfully holistic, unifying images that make render it difficult to think of society as a whole as anything other than an essentially discrete and (ideally, at least) functioning unit.

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<sup>111</sup> On this, see Koskenniemi, loc. cit. n. 7, at p. 333.

One of the first, and most frequently recurring, examples of the mechanistic metaphor is provided by Allott's dual definition of society (and many of its component parts, such as law) as a "structure-system".<sup>112</sup> This term is meant to encapsulate society both as a unified and discrete entity (a structure) and also as something that is dynamic, fluid, constantly developing through the operation of its "generic principles" (a system) (and thus providing us with another example of an enacted dialectic in his work, this time between the static and the changing, or between space and time).<sup>113</sup> In doing so, he appears to be working with a definition capable of encompassing all aspects of society, its capacity to develop – sometimes in a revolutionary manner – whilst remaining recognisably the same in another sense. The inclusiveness of this definition is further bolstered by its familiarity: although unusual when coupled together as one term of art, there is nothing in the least odd about referring to society as either a structure or a system; indeed, both terms are so commonly applied in this manner as to be regularly accepted without further thought. Rhetorically speaking, however, neither word is as neutral or as devoid of substantive implication as we might suspect.

The situation in which metaphorical uses of words become so common as to be viewed as literal is one form of *catachresis*, commonly found, for example, in such figures of speech as the "mouth of the river", the "foot of the hill" or the "hands of a clock". In everyday expressions such as these, there is relatively little at stake, and so the literalisation of metaphor may be allowed to pass without comment. In works of philosophy, on the other hand, such usage may have direct consequences for the development of the theory, and thus must be examined closely. Perelman makes this point in relation to the Cartesian method of philosophical enquiry: using the catachresis of a "chain of reasoning", Descartes insisted that any argument was only as strong as its weakest link, and from there constructed his basic methodology of working back from any proposition, testing each stage in its argumentative construction, and invalidating any claim that was not compelled, directly and analytically, from indubitable premises. Perelman points out that, had Descartes

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<sup>112</sup> This is the definition of law with which the book opens: Allott, op. cit. n. 6, at §1.1.

<sup>113</sup> It is true that Allott states that society "*is not a thing but a process*" (ibid., at §3.1; see Nicholas Onuf, "The Constitution of International Society", 5 *European Journal of International Law* (1994) 1-19, at p. 1). This, however, is best viewed as an attempt to avoid the reification of society, and not as a denial of the often relatively stable nature of its identity, continuing through time.

conceived of the structure of argumentation rather like that of a piece of cloth, woven from many different individual strands but significantly stronger as a whole than any of them individually, his philosophy might have looked quite different.<sup>114</sup>

The metaphors of “structure” and “system”, so commonly applied to the theory of society as to now appear quite literal and uncontroversial, function in the same manner in Allott’s work: they serve to draw our attention to certain possibilities and away from others, and generate particular expectations in our minds of his conclusions. The most obvious example is that both immediately call to mind the nature and workings of *machines*, functioning within a set framework according to a particular set of rules. Both also connote a sense of neatness, of transaction-without-remainder, of overall coherence within their own boundaries. It is thus a relatively small, and easily acceptable, rhetorical step from the fairly banal and uncontroversial claim that society is a “structure-system” to the much stronger, and eminently contestable, assertion that society is “a totality, an integrated structure, a self-coherent system”,<sup>115</sup> guided, in ideal form at least, by a uniform set of operating principles. And when society does not work like this, it is not a problem with the theory, or with the basic idea that it can and should: it is viewed, quite literally, as a *malfunction*: “Machines break down. Living things suffer disease, decay, and death. Any structure may fall apart. Any system may work badly or fail... To do well, in and through society, is a human potentiality. To do badly, in and through society, is an all-too-human possibility”.<sup>116</sup>

The support that these mechanistic metaphors, and many others like them throughout the work, provides to the fundamental claim of the possibility of transcendence of conflict and dilemma should be clear: society, in its utopian existence, is a machine; as such, its operating principle *must* be that of systemic completion, of the parts functioning together to create something more than themselves without themselves

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<sup>114</sup> Perelman, *The Realm of Rhetoric* (Notre Dame: University of Notre Dame, 1982), p. 122. This example, although illuminating, should not be overstated in the context of Descartes’ work: it is possible that it was his philosophical project, of gaining incontrovertibly “true” human knowledge, that led him to adopt the metaphor of a “chain” of reasoning, and not vice versa. The example, however, serves well to illustrate the point; and the objection above is not applicable to the argument of this section in that here we are concerned with the rhetorical construction of authority claims in Allott’s work, and not with his particular *choice* of methodology.

<sup>115</sup> Allott, *op. cit.* n. 6, at §9.30.

<sup>116</sup> *Ibid.*, at §12.3.

being negated or destroyed in the process. The ideal of the machine must *function*, and function cleanly and neatly – however imperfect, however messy, it always appears to be in practice. The parts of the machine may be in apparent conflict with each other individually, but they combine to produce, ultimately and ideally, the desired result.

There are innumerable examples of such mechanistic metaphors in Allott's work, which are often supported by overtly scientific ones – each serving to support the credibility of the others by their constant invocation. Think, for example of his early definition of the basic concept of imagination: it “generates connections within the contents of our minds, making available to us a series of connections from among the infinity of possible connections, establishing electrochemical pathways connecting mental contents of all kinds”,<sup>117</sup> or the role that he ascribes to “the constant of supersocialization”.<sup>118</sup> It is also interesting to note the role that Allott's use of figures plays in establishing the equivalencies constructed by the repetitive use of metaphor: almost all portray key terms in something very similar to a flow chart, with each existing in a binary (if sometimes dynamic) relation to one other key concept;<sup>119</sup> again, the effect is to create an impression of neatness, of effective functioning-according-to-principle, of machine-like order and efficiency. Most striking, in this regard, is the figure detailing the social exchange (itself a decidedly mechanistic idea as presented in the book): it is actually portrayed in the form of an equation.<sup>120</sup>

The second, related set of metaphorical equivalencies that Allott constructs to support his conclusions are *organic*, as can be seen from the quote above on “machines breaking down”: “living things suffer disease, decay, and death”. The repeated assertion of the symmetry between the natural world and the social world, and of that between society and the individual, represents for me one of the key justificatory techniques upon which the argumentative platform of the whole theory is based. It creates two different sets of effects: the first is that, in a manner very similar to the mechanistic metaphors, it allows us to accept the idea of society as a discrete entity,

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<sup>117</sup> Ibid., at §1.14.

<sup>118</sup> Ibid., at §12.32.

<sup>119</sup> See e.g. *ibid.*, at §3.26.

<sup>120</sup> Ibid., at §10.19.

as unity; the second is to lend support to the overtly naturalistic claims that he makes towards the end of the work.

The first is exemplified by Allott's suggestion that the reality of society mirrors that of the individual (which is again, in turn, supported by the unstated underlying philosophical claim that the structure of the universe is repeated in its constituent elements). This technique is most evident in his discussion of the constitution of society, leading up to his postulation of the functioning of the social exchange:

An individual human being has a personality. A society has a constitution. The constitution is for society what personality is for the human individual – the unique structure system which confers a unique present-here-and-now on a unique individual enabling that individual to make a future from the past, a past from the future, possibilities from actualities, actualities from possibilities.<sup>121</sup>

This passage is of crucial importance to the argument that he advances, for it is this that allows him to slip from the banal and uncontroversial notion that individual human beings have purposes and interests directly to the much less evident claim that societies can also be unproblematically understood as possessing these *in essentially the same manner*. The importance of *that* assertion to the social exchange cannot be overstated: after all, it is in exchanging natural power social power (that is, by dedicating it to social purposes) that the legal relation, which alone has the ability to universalise the interests of the individual in society and individualise those of society in the individual, is created. It is only once such a move has been made that the reader can be asked to acquiesce to such statements as “in law, society remembers what it has decided to become”.<sup>122</sup> Here, it seems clear that Allott is depending upon

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<sup>121</sup> Ibid., at §9.2. Another strong statement along the same lines can be found in §4.37. It is worth noting that here, again, Allott makes use of an argument that may be familiar to many from the previous works of major thinkers, without making explicit reference thereto; in the case, Freud. In *Civilization and its Discontents* (London: Penguin Books, 2004; first published, 1930), Freud argues that “... if we focus our attention on the relation between the civilization of mankind and the development or upbringing of the individual, we shall conclude, without much hesitation, that the two processes are very similar in kind, if not indeed one and the same process, as it affects different kinds of object” (p. 98). Yet even the very vague, diffuse sort of authority that this echo imparts to Allott's claim should not go unchallenged; if, indeed, it is making unspoken reference to Freud, Allott's claims are premised upon a very different basic theory to that used by the psychoanalyst (itself the subject of much controversy). Moreover, Freud himself counsels caution, noting that in this regard “the search for analogies should not be pursued to excess” (pp. 98-99).

<sup>122</sup> Allott, loc. cit. n. 19, at p. 224.

a (con)fusion of the ideas of analogy and metaphor for the force of his argument.<sup>123</sup> Certainly, both are used to construct equivalencies between the objects thus related; however, the former, once accepted, can be used in quasi-formal argumentation to make authoritative statements about the second term in function of its relation to the first; the latter, on the other hand, is a much more literary device, used to create an image in the mind of the reader – not to allow him to draw a particular set of fixed conclusions. This distinction is perhaps best drawn out by using the two terms in conjunction with “reasoning”: analogous reasoning has long been accepted as a valid mode of syllogistic progression by all but the most strict of logicians; “metaphorical reasoning” clearly has not (hence the need for the inverted commas). In this case, while we can happily accept the idea that a constitution is a society’s personality is a potentially illuminating metaphor for some situations, it is, to my mind at least, much harder to accept it as an analogy – that is, as an equivalency upon which a process of quasi-logical reasoning can be based. Allott, although never explicitly, draws heavily on this metaphor in asserting that societies have discrete minds, consciousnesses capable of generating purposes and interests. In doing so, he elides the distinction between metaphor and analogy, treating the latter as the former; naturally, the literary style of the whole book makes this elision much less evident, and much less controversial, than it would otherwise appear.<sup>124</sup>

A related, but still more problematic, technique is used by Allott in order to create an equivalence between society and the physical world. We first encounter this in his discussion of the conceptual couplets *impulse of life* and *necessity* (which belong to the realm of the physical world) and *desire* and *obligation*, which he presents as their counterparts in consciousness: “Obligation is necessity which consciousness makes for itself, from within itself, to enable it to act as a system”.<sup>125</sup> Just as the impulse of life and necessity combine to produce cause and effect, so their counterparts in the

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<sup>123</sup> It is true that Perelman (op. cit. n. 109, p. 120) insists that metaphor is merely a truncated analogy; however, he is, to my mind, a little dogmatic in this, ignoring the fact that, generally speaking, while one is acceptable in most types of philosophy, the other is “confined” to the realm of literature.

<sup>124</sup> Interestingly, at one point Allott notes that there is no necessary correlation between the personality of an individual and the constitution of society, but that this is how we have come to conceive of the issue: “What might have been merely a metaphor or a theoretical construct has become the most substantial of realities. Societies have acquired within consciousness the personalities of individual human beings”. (Allott, op. cit. n. 6, at §4.30). However, the effect of the metaphors that he constructs in the course of the book is to naturalise, we might even say essentialise, that very conception.

<sup>125</sup> Ibid., at §3.17.

realm of consciousness, desire and obligation, combine to produce human willing and acting.<sup>126</sup> Allott then represents these progressions in a figure in the basic flow chart form: the two processes, then, are kept entirely separate, and yet placed side by side. In this way, he is able to create a powerful impression in the mind of the reader of the essential symmetry, identity even, of the structures of the physical world and those of consciousness.<sup>127</sup>

Allott further bolsters the structural equivalencies engendered by these metaphors by conflating them. Consider, for example, this comment on the “generic principles” of the constitution: “they are the principles which, like the operating principles of a living thing or of an organic system or a material system or of a machine, systematize the interacting of the sub-systems of society’s constitutional structure”.<sup>128</sup> Or the following passage, which bears a strong resemblance to the one above on the symmetry of individual and societal consciousness, but differs from it in one crucial respect:

A person and a society are also one and many in another sense. Each is a multiple unity. The component parts are systems of component parts. A person is a system which integrates subordinate physiological systems and it integrates those sub-systems within the system of consciousness. A society is a system which integrates both its own subordinate systems (for example, decision-making bodies) and the systems of systems which are individual persons.<sup>129</sup>

Again here we can quite clearly see both the mechanistic metaphor and the attempt to establish a sense of structural identity between the society and the individual; this time, however, it is not the reality-for-itself of consciousness of each that is equated, but rather the sub-systems of society (e.g. decision-making bodies) and the physiological systems of humanity. Thus, not only do we have the insinuation of a symmetrical relationship between societal and individual consciousness, but also between the constructions of the social world and the physical reality of the natural

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<sup>126</sup> Ibid., at §3.11-§3.18.

<sup>127</sup> A similar technique to this is used in his discussion of the justification of the generic principles of a constitution, when he discusses the validity of scientific propositions in one paragraph (§11.9) and then suggests a structurally identical argument for his proposed principles (§11.10). See *supra*, n. 65 and accompanying text.

<sup>128</sup> Ibid., at §11.4.

<sup>129</sup> Ibid., at §4.25.



world. Without ever actually explicitly claiming so, Allott implies an identity between the *physiology* of human beings (conceived of as the totality of necessity of our functioning) and the *sociology* of society (“a *totality of obligation* in the social consciousness of that society”). This is a move of some importance in the context of the claims of the latter stages of the work, as Allott begins more and more to introduce an idea of natural and necessary progress into the theory of society; evident already in his notion that international society has *misconceived* itself as “unsociety”<sup>130</sup> (a surprising notion, which seems to compel the idea that international society somehow *is* other than it is *conceived* to be) it is made explicit most clearly in passages such as the following, for which only the careful construction of metaphor – of both sets discussed in this section – could prepare the reader, particularly without the support of more overt forms of authority:

However, from the vantage point of the end of the twentieth century, it is possible to perceive the activity of international society in the last five centuries, especially its activity in the twentieth century, as the pre-natal ordering of a society which was yet to be born into the world of its own consciousness, as the unselfconscious self-socializing of a society which did not yet know itself as a society. It is possible to say, with the benefit of hindsight and hypothesis, that international society has been ordering itself in spite of itself. International society has been not merely a self-misconceived unsociety but a presociety instinctively or spontaneously seeking to become a society.<sup>131</sup>

In this passage, we can see the culminative effect of many of the various different aspects of the rhetoric of *Eunomia* that I have been discussing here: the characteristic novelty and complexity of the prose, the privileged voice of History, and the personification of society and its natural and inevitable progression. Again, in the absence of these, the only appeal to authority that Allott makes is to the self-evidence of his assertions; by this stage, however, the reader is either “in” or “out” – and this will depend almost entirely upon his reaction to the rhetorics of the piece. In particular, one who has accepted the mechanistic and organic metaphors that Allott uses to construct the structural equivalencies upon which much of the passage just quoted relies will see nothing particularly odd or objectionable in it; those who have not, however, are more likely to react with profound skepticism to his claims. Both

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<sup>130</sup> See generally *ibid.*, ch. 13.

<sup>131</sup> *Ibid.*, at §15.8.

the overriding sense of systemic completion and that of the natural development of society as a discrete individual, then, are engendered through the metaphors used and the repeated assertion of structural equivalencies. Rejection of these, at least as a persuasive basis for a process of analogous reasoning, is very likely to lead us to deep suspicion, if not outright rejection, of the conclusions that he reaches.

### *Technique*

I want to conclude this section by having a brief look at some of the other rhetorical devices that Allott employs in order to provide his claims with a sense of authority that finds little or no elaboration in the explicit argument of the text. Again, Koskenniemi's analysis of some of these is illuminating, particularly in the context of the sense of grandeur that is created by repeated use of the technique of *anaphora* (the repetition of the same word or phrase at the beginning of successive sentences),<sup>132</sup> and Allott's frequent justificatory incantation of what Perelman refers to as "universal values" – values whose desirability is part of the definition of the term itself – such as "happiness", "well-being" and "prosperity",<sup>133</sup> without going into the necessarily messy and controversial business of specifying their meaning in any further detail. Also interesting in this regard is Allott's fairly frequent habit of reinforcing the sense of all-encompassing completion that pervades his work by use of abnormally long lists of examples, often starting with the smallest and ending with the largest of the object of concern;<sup>134</sup> he does not intend these lists to be exhaustive, and the basic point could be made with a much lower number of exemplars equally clearly; perhaps not, however, equally effectively. Or we might consider again the use of numbered paragraphs, and the manner in which they impart a sense not simply of structure but also of logical progression that in their absence would often be simply lacking. However, of all the various techniques that he employs in the constitution of authority in his work, two strike me as being particularly noteworthy.

The first is his regular habit of postulating something as true, then inverting the subject/ predicate relation of the claim and asserting that as true also: "By education society takes power over our consciousness. By education we take power over

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<sup>132</sup> See e.g. *ibid.*, at §14.5, where Allott repeatedly begins sentences with the words "Law is...". Koskenniemi refers to this as "staccato"; see Koskenniemi, *loc. cit.* n. 7, at p. 331.

<sup>133</sup> *Ibid.*

<sup>134</sup> See e.g. Allott, *op. cit.* n. 6., at §3.37, §5.50.

society's consciousness. Knowledge takes power over consciousness. Consciousness takes power over knowledge."<sup>135</sup> Or he constructs complex compound predicates, and reverses the terms of these: "Law is the socialization of particular desire, the particularization of social desire. Law is the socialization of particular obligation, the particularization of social obligation."<sup>136</sup> What is enacted in the rhetoric of these apparently conflicting constructions is, once again, the dialectical spirit that is characteristic of the book as a whole: by asserting one followed immediately by its inversion, we get a sense not of aporia but rather of circularity, and of the systemic completion and closure that this implies. Despite Allott's protestations to the contrary, this is not the rhetoric of revolution, but rather of *resolution*.

The second may be termed his *enallage of time*. Enallage is the substitution of one part of speech for a different one, usually to create an emphatic effect: Perelman uses the example, in terms of time, of "if you speak, you *are* dead".<sup>137</sup> Here, the (grammatically correct) future tense is dropped, and replaced with the present: the consequence is a sense of immediacy, of urgency, of making the threat (or the promise) of the future more *real*. I have already noted the surprising lack of the conditional mood in the book; perhaps even more striking, however, is the fact that it is written almost entirely in the present tense. This is an example of enallage of time writ large: Allott's analysis and critique of the present circumstances of international society *and* his prescriptions for how things *should* work are both thus imbued with a sense of actuality, of reality that framing the latter in the future tense would simply not convey. For example, during a lengthy and powerful critique of the failings of international society, entirely misconceived – and hence woefully malfunctioning – as international *unsociety*, Allott notes that

Lacking a total social process, interstatal unsociety could not be socialized in the name of justice. The power used externally by the state-societies is not conceived as social power, because there is no conception of a society to delegate it as a social power. It is conceived of as natural, unsocialized power, energy applied for a purpose.<sup>138</sup>

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<sup>135</sup> Ibid., at §3.5.

<sup>136</sup> Ibid., at §14.5.

<sup>137</sup> Perelman, op. cit. n. 109, at p. 38.

<sup>138</sup> Allott, op. cit. n. 6, at §13.105.

However, despite this acknowledgement, he later goes on to insist that

every single legal relation in which any society of any kind, including a state-society, participates, or in which any individual human participates, is a relation created by delegation from international society. This is true of every legal relation from a power-right to make law for the whole world to a power-right to cause the installation of a particular traffic-light at a particular road-junction.<sup>139</sup>

Of course, it is difficult to see how, if Allott's diagnosis of the current state of international society is accepted at all (and to me it is in his diagnostic voice that he is at his most convincing), all legal relations everywhere can be in any meaningful sense delegated from that society. It seems clear that, in one passage, he is speaking in terms of practical reality, whilst in the other it is the voice of ideal theory that is heard. This refusal to use the future tense is also effective in creating and inscribing the reader within an overall progress narrative: often, Allott will begin with an unremittingly grim view of the world as it is, then move to an expression of his pure theory, and only then begin to consider some of the "advances" that have been made during the twentieth century, all in the present tense. The postulation of the antithesis of the ideal followed immediately by the ideal itself acts to lend credence to the idea that certain developments, such as, for example, the advent of human rights,<sup>140</sup> are quite simply a development in the natural progression from one extreme to the other, as seen from the privileged "vantage point"<sup>141</sup> that is (or was) the end of the twentieth century. By framing the argument of the book in this manner, Allott thus makes it appear entirely plausible that "that humanity is passing through what is presumably a transitional period in which the international public realm is forming itself",<sup>142</sup> as it moves from self-misconception and malfunction towards the ideal *telos* of the pure theory of *Eunomia*.

### **The Mystification of Society**

The rhetorics of Allott's work thus combine to create certain expectations, a certain credulity even, on the part of the reader, to draw his attention towards certain

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<sup>139</sup> Ibid., at §16.33.

<sup>140</sup> See e.g. *ibid.*, at §15.62.

<sup>141</sup> This is an idea that Allott appeals to frequently; see e.g. §15.8, §15.44, §15.56, and §19.17, amongst others.

<sup>142</sup> Ibid., at §15.59.

possibilities and to blinker him to others. In particular, arguments based upon a notion of equivalence between a society and an individual, between a society and a machine, and between the functioning of social reality and that of physical reality are all given a *prima facie* respectability and plausibility that they simply would not enjoy without the complex and involved construction of metaphor and analogy, whilst the intricacies and novelty of the language, combined with the assured and often severe authority of the voice, serve to further bolster this. The centrepiece of the theory, the “generic principles” of the constitutions of all societies – from families to sports teams, local businesses to multilateral corporations, international organizations to states and finally to the global society of the whole human race – receives, as I argued above, very little in the way of persuasive justification in the normal sense of academic writing. Instead, it relies for its authority on that which is enacted in the rhetorics of the piece. The argument that I want to advance in this section is that these principles are then relied on by Allott as he moves his pure theory towards what we may properly term as a “mystification” of society in general, and international society in particular.

This mystification proceeds, broadly speaking, in three main steps. The first is the *elision of conflict*; the gradual abandoning of the aporia as expressed in the early stages of the work, most notably in the context of the irreducible and irredeemable perennial dilemmas, in favour of a spirit of integration, reconciliation, and dialectical transcendence:

... law is necessarily in the social interest. This is a consequence of the fact that the law is a means of the systematic self-ordering of society, as it applies its purposes to transform natural power into social power... [this] is a consequence of the fact that, within a society, an individual member and the society do not have intrinsically conflicting interests. Each forms and is formed by the other. Each gives and receives value from the other. The individual member of society is the society individualized. The society is the individual socialized. Law embodies this transformation.<sup>143</sup>

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<sup>143</sup> Ibid., at §11.28.

Thus it is not the function of law to reconcile intrinsically conflicting interests. Law is an expression of the self-interest of all members of society in the survival and prospering of the society and the self-interest of the society in the survival and prospering of its members.<sup>144</sup>

The dialectical method, which also gains authority for its introduction through the rhetorical enactments of the book rather than through more conventional forms of argumentation, at this point becomes itself alone the authority for the shift in focus from the conflict of the perennial dilemmas to their resolution in the ideal society. In law, society can transcend conflict between itself and its members and, by universalising the particular interests of the latter, presumably also those between the individual members themselves. The perennial dilemmas still exist, still drive the becoming of society; now, however, they are contained within the overall framework of that society, as a properly-functioning machine and as a healthy organism. At this point, however, the system is not yet closed; the possibility of ethical resistance to law itself remains open.

The second step, then, is the *fetishisation of law*, the closing of the escape route away from the results of the functioning of the “total social process” and back into the aporia and contradiction of the dilemmas. This fetishisation is most evident in Allott’s discussion, and exclusion, of the notion of illegal physical force as a viable ethical option:

Law transforms natural power into social power by means of legal relations which determine when and how natural power may be used for a social purpose, by whom and in relation to whom. Physical force is not some natural residual power available to any society-member, unsocialized but socially accepted, to be used at will, even if only in the last resort.<sup>145</sup>

In society the last resort is law and legal power. To consecrate the use of physical force by making of it some general theoretical category of social and legal power is to consecrate anti-social behaviour.<sup>146</sup>

Not only, then, does law transcend conflict; it also, in the final instance, disposes of it. Any resistance to law must take place “to the extent that law itself so allows”.<sup>147</sup>

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<sup>144</sup> Ibid., at §11.30.

<sup>145</sup> Ibid., at §15.18.

<sup>146</sup> Ibid., at §15.19.

Thus Allott comes to exclude exclusion itself through the mechanism of law: ultimately, the limits of morality and the limits of law reveal themselves, within this model, as coextensive. It seems clear that any attempt to finally contain the particularity of the ethical decision within a framework of general rules, be they moral or legal, procedural or substantive, automatically and of necessity brings us back within the “modern problematic”; and, from the standpoint of the critical challenge, such a claim can only be based in the final instance upon a fetishisation of law itself.<sup>148</sup> It is not to overstate the matter to say that, within the terms of that challenge, it is only if we keep the possibility of illegal force, violence and ultimately war alive that we can have a genuinely ethical approach to our laws. It is only if we remain able to make sense of the notion of “ethical but illegal” (or, indeed, “unethical but legal”) that any sort of response to the critical challenge, as I have sketched it here, can even begin to be articulated.

One objection may be raised here: that Allott’s theory is an ideal theory; where society is malfunctioning, then the possibility of illegal resistance is once again activated. Certainly, Allott’s enallage of time, his habit of speaking always in the present tense regardless of whether he is in his diagnostic or normative mode, lends some support to this possibility; however, it must, in my view, be rejected. Firstly, because it is abundantly clear from Allott’s description of international unsociety that he views it as currently functioning very badly indeed; and yet it is equally evident from his polemic on the subject of war that he *in no circumstances* views it as an acceptable ethical choice.<sup>149</sup> Secondly, Allott openly concedes that his utopianism is practically unattainable, that it will always be out of reach, that society “will never be what it might be”;<sup>150</sup> this being so, all actual societies malfunction to a degree. If his exclusion of non-legal violence were to be limited only to an admittedly unachievable state of utopia, it would lose all of its force as a principle upon which willing and

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<sup>147</sup> Ibid., at §11.27.

<sup>148</sup> I am using the term “fetishism” here in the classic sense given to it by Marx, in his famous passage on “commodity fetishism” from his *Capital* in which “...a definite social relation between men, that assumes...the fantastic form of a relation between things”; broadly speaking, whenever a man-made relation, such as law, becomes first reified and then comes to dominate absolutely its creator. See Karl Marx, *Capital* (London: Penguin Books, 1976) p. 165. More particularly, in this context here, I am using it to refer to the process by which law itself comes to be understood as providing an absolute and unchallengeable boundary to moral action.

<sup>149</sup> See e.g. *ibid.*, at §15.10.

<sup>150</sup> Ibid., at §5.47.

acting should be based, leaving Allott's ideal theory wide open to the kind of criticism expressed so caustically by Kenneth Burke: "...once you postulate human virtue as the foundation of a system, you are a dullard indeed if you can't make up a thousand schemes for a good society".<sup>151</sup> The incredible imaginative structures of *Eunomia* are anything but the work of a dullard; however, if Allott's conclusions in this regard are to be held valid only in terms of ideal theory, then the basic thrust of the critique still finds its mark.

The final step is the *mystification of society* itself. This is implicit in a number of themes that run through the book: the notion of a self-misconceived unsociety; the progress narrative that suggests a "spontaneous" and unselfconscious departure along the road marked *telos*;<sup>152</sup> the argument that twentieth-century developments should be viewed as "outward signs of this natural and inevitable self-reconceiving of international society and its law"<sup>153</sup> – all seem to point, in the final analysis, to the postulation of a conception of society that is somehow external to, and ultimately unconditioned by, human consciousness, individual or social, whatever its state at any given point in time. For me, however, it is given its full and explicit formulation in the following passage, worth quoting at some length:

In a self-misconceived international society, in which there is no conception of an international social process or international reality and reality-forming, in which there is no conception of an international constitution, and in which there is no international public realm but only the interacting of a number of individual public realms, there can be no conception of the supremacy of law. There is nothing transcendent into which law can be integrated, no transcendent structure-system, no transcending structures of theory and value. And where there is no conception of the supremacy of law, there can be no adequate conception of the reality of non-law, including especially morality. When law has no established place in the systematic relationship between individual and social consciousness, morality cannot find an established place in the systematic relationship between individual consciousness and the reality of all-that-is. The misconceived international society is a desert in which neither international law nor morality can take root and flourish.<sup>154</sup>

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<sup>151</sup> Burke, *Counter-Statement*, op. cit. n. 71, at p. 114.

<sup>152</sup> See e.g. *supra*, n. 125 and accompanying text; see also §16.78, in which Allott claims that "[n]ot knowing itself as society, international society has not been able to see, or else to understand, that it is following the same course of development" as those state-societies that have turned away from sovereignty, first to democracy and then to social justice.

<sup>153</sup> Allott, op. cit. n. 6, at §16.79.

<sup>154</sup> *Ibid.*, at §16.53.



What is most extraordinary about the above passage is its apparent claim that it is the failure of international society to conceive of itself *qua* society, and thus to structure its functioning along the lines of the generic principles of the constitution,<sup>155</sup> that has *caused* the failure to develop satisfactory law and hindered the creation of a transcendental global morality; there is absolutely no sense that, to the contrary, it is a shared sense of morality that allows for an advanced legal framework (of course, these two are mutually constitutive to an extent) – and that it is the combined existence of these that allows us to talk of the construct-in-consciousness that is society. This also comes through strongly in his discussion of the adoption of the Vattelian model as the paradigm for international legal relations: he laments that international society did not instead choose an approach based on the theories of Rousseau or Kant, that it has not “had its 1789 or 1917”.<sup>156</sup> Again, there is no sense that international society – such as it was and is – lacked the basic prerequisites to make such a choice; and this despite the fact that Kant himself explicitly rejected the kind of single global society thesis that Allott is proposing, preferring instead a “league” of republican nations. It is in this sense, then, that we might recall the terms of Marx’s powerful critique of Hegel’s *Philosophy of Right*, in which he made precisely the same allegation of mystification: ultimately, in Allott’s pure theory of society, as in Hegel’s of the state, “... the conditions are put forward as what is conditioned, what determines as what is determined, the producer as the product of its product”.<sup>157</sup>

### ***Eunomia, Philosophy, Literature***

I want to begin this short concluding section by way of a disclaimer. I am aware that this examination of Allott’s remarkable theory has been overwhelmingly critical in character; that it has glossed over or simply ignored the many and varied qualities that it possesses. That it does possess such qualities, I would certainly not deny; it is an extremely impressive work of imagination, with some wonderful formulations of new

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<sup>155</sup> See e.g. *ibid.*, at §20.24: “Failing to recognize itself as a society, international society has not known that it has a constitution. Not knowing its own constitution, it has ignored the generic principles of a constitution”.

<sup>156</sup> *Ibid.*, at §13.107.

<sup>157</sup> Karl Marx, “From the Critique of Hegel’s *Philosophy of Right* (1843)” in Joseph O’Malley, ed., *Marx: Early Political Writings* (1994) 1-27, at p. 3.

problem sets and reformulations of old. The work is, for me, particularly powerful in its diagnostic mode – perhaps because this is the area in which the claims to self-evidence upon which it relies are empirically and experientially testable and hence more readily acceptable. There can be no doubt that, in his critique of the current state of international society, Allott makes an extremely insightful and important contribution to the field, and that his constant and innovative reconstitution of the language in which we think about such problems has created some potentially fruitful avenues for dealing and living with them. Undoubtedly, then, it is possible to read it in a certain sense much more generously than I have here, as an innovative and potentially very fruitful redescription of international society and its law – indeed, Koskeniemi himself hints at just such a reading when he refers to it, in a formulation echoing Rorty, as “therapeutic”.<sup>158</sup> My goal here, however, has been to focus on only one aspect of the work, albeit a fundamental one. In the course of the book, Allott reaches a number of very strong, philosophical conclusions; and my aim has been to examine how he constructs the authority for the truth claims he makes, particularly in his normative, utopian voice; and to use this analysis to evaluate his work in the light of the critical challenge that I sketched at the outset. In short, the question that has driven the analysis in this paper has been: Is *Eunomia* a compelling response to the critical challenge to international law, as I have framed it in these pages? And, if not, why not?

As should be clear by now, my answer to the first of these questions is in the negative. As I have shown in the preceding sections, Allott’s work relies upon its literary element – its imaginative rhetorics, broadly understood – in order to render plausible and acceptable a particular set of peculiarly *philosophical* claims. In its basic dialectical method, in its attempt to exclude exclusion through the transcendental potential of the law, it seeks to use literary techniques to justify that which philosophical argumentation has until now been unable to: the creation of a persuasive, general normative theory that can provide us with universal and acultural rules upon which we must base our willing and acting. In particular, in his fetishisation of law and his mystification of society, which together combine to trump the conflict and aporia of the perennial dilemmas, he abandons the literary paradigm

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<sup>158</sup> See Koskeniemi, loc. cit. n. 7; for Rorty on “therapeutic” philosophy, see e.g. *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1980) at xiii.

in favour of something much more *modern*. It is in this sense, I think, that we can best understand Koskenniemi's claim that Allott "is not really a challenger but a continuer of a tradition that always sought new ways to articulate the basis for a universal law".<sup>159</sup>

It is also important to add, I think, that his project, implicit yet also evident throughout the work, of synthesising philosophy and literature did not succeed. In the end, the many-voicedness of the literary paradigm, the irredeemable conflict and tension that this implies, is utterly usurped by the dialectical method of the book. The ultimate themes of reconciliation and transcendence, the authoritarian voice,<sup>160</sup> the general universality of the conclusions – all point to the search for Truth, not an attempt to live with truths; and this belies the apparently literary nature of the prose in which the argumentation and justification is constructed. Allott himself has, I think, in the years since *Eunomia* was first published, moved more and more explicitly in that direction: whilst, for example, the influence of authors such as Foucault is evident in his assertion that "[t]o make theory is to make society. To dominate theory is to dominate social power. To defeat theory is to defeat a structure of power",<sup>161</sup> his much more recent claim that "[i]f you say that there cannot be ideas that are separate from power and that all you are doing is joining in power in a rather devious, clever way, then I despair",<sup>162</sup> is a clear renunciation of that heritage. The implicit foundationalism of his work has driven him to explicit foundationalist beliefs, despite the promise to the contrary in the early stages of *Eunomia*.

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<sup>159</sup> Koskenniemi, loc. cit. n. 7, at p. 340.

<sup>160</sup> I noted above (*supra*, n. 86 and accompanying text) Koskenniemi's claim that Allott's voice was that of Zarathustra. I'd like to nuance that a little here, because Nietzsche's writing, to me, avoids the foundationalism that Allott ultimately returns to, despite the authoritarian voice common to both. Zarathustra's pronouncements, although presented in a manner that would seem to suggest that universal and timeless truths were being conveyed, are in fact constantly undermined in the course of the work. Think, for example, of the fact that, towards the end, Zarathustra mocks himself for carrying the corpse of the street artist with him at the beginning; or, indeed, of the fact that the book ends with a beginning, a new dawn. Or consider his frequent assertions that others seeking the perpetual becoming of the overman should not follow his path, but rather find their own – and only then would he come to them as an equal. Thus, through the enacted becoming and the radical individualism of the book, Nietzsche constantly undermines the apparent objectivity and universality of Zarathustra's assertions; there is nothing comparable to this in *Eunomia*. In this manner, the former book retains a much more literary element than the latter.

<sup>161</sup> Allott, op. cit. n. 6, at §12.41.

<sup>162</sup> Allott, loc. cit. n. 1, at p. 271.

To this extent, I must break ranks a little with the apparent consensus on Allott's work: for it is not merely the practical potential for abuse that his totalising vision of society that makes me uncomfortable;<sup>163</sup> I am also, ultimately, unsympathetic to his general project at the most fundamental level. In this, I disagree with Carty's assertion that Allott's work is concerned with that which "can only be expressed in the language of metaphor":<sup>164</sup> the effect of the metaphorical equivalencies that he constructs is to point away from the multiplicity of literary voice and back towards the singularity of the Philosophical one. It is only the *authority* for his claims that Allott seeks to construct through the exploitation of literary technique; the claims themselves remain those of the "great tradition" in which the author seeks to locate himself. Allott's use of literature invites, indeed compels, the kind of examination that I have performed in this paper; that same examination, however, itself compels the conclusion that the literary elements of the work are introduced in service of an ideal that is not their own, as a means of constructing authority in an area in which standard academic argumentation has failed. For, in the final analysis, *Eunomia* is not, as Carty suggests, "something to do with literature and rhetoric, something spiritual";<sup>165</sup> rather, it is literature in the service of Philosophy, a vocabulary and a paradigm subordinated and harnessed to a set of purposes that are quite alien to it. The search for a response to the critical challenge, then, emphatically does not end with *Eunomia*; we must look elsewhere for an understanding of the international legal order based on the ubiquity and irreducibility of the aporia that drive it.

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<sup>163</sup> On this, see e.g. Outi Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community* (The Hague: Kluwer Law International, 2000); See also the review of this book by Andreas Paulus, in 12 *European Journal of International Law* (2001) 1027-1029.

<sup>164</sup> See Carty's comments in "Thinking Another World", loc. cit. n. 1, at p. 276.

<sup>165</sup> Ibid.